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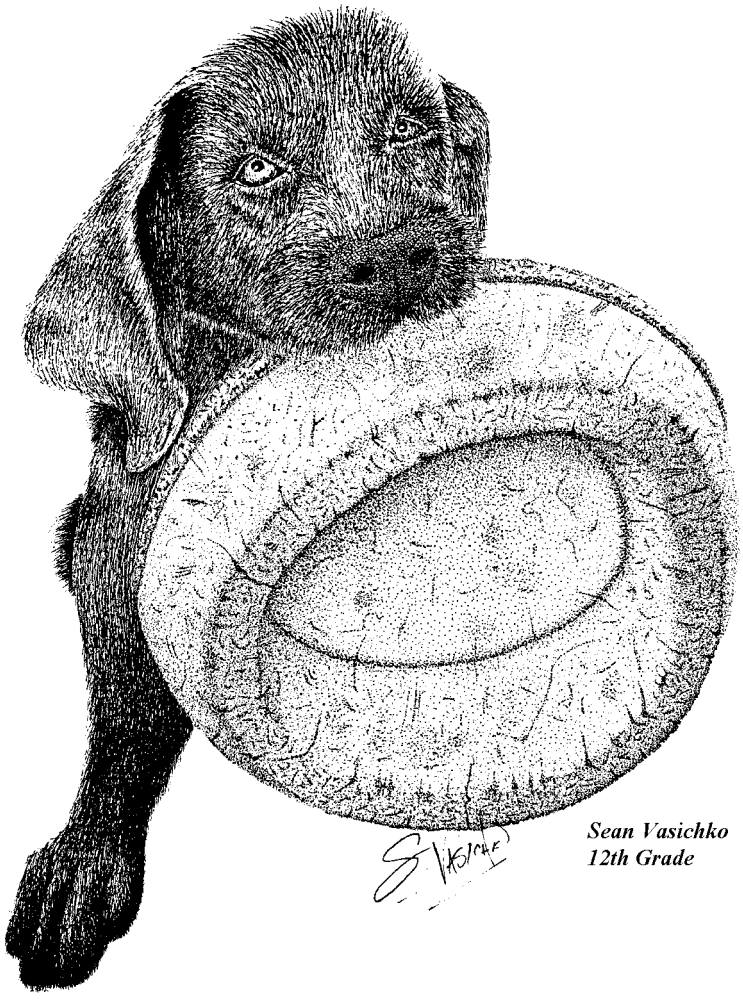

Sean Vasichko
12th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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Office of the Secretary of State
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Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
subadmin@sos.state.tx.us

WITHDRAWN RULES

ADOPTED RULES

EXEMPT FILINGS

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Executive Order

RP 25

Relating to increasing the immunization rates for children in Texas

WHEREAS, immunization from vaccine preventable diseases protects children who receive the vaccines as well as the people around them, including their parents, siblings, friends, and playmates who may not have been vaccinated; and

WHEREAS, vaccines save lives if enough people in a community are vaccinated, making it more difficult for a vaccine preventable disease to spread; and

WHEREAS, a child who begins and remains on a regular vaccination schedule will have greater protection from serious diseases such as diphtheria, tetanus, pertussis, polio, measles, mumps, rubella and other potentially life threatening diseases; and

WHEREAS, as Governor, I have supported legislation to improve the Texas Department of Health's Immunization Program, and have directed the Department to improve the policies and outreach programs to help more Texas children receive protection from vaccine preventable diseases; and

WHEREAS, also last session, I signed five pieces of legislation designed to comprehensively reform the Immunization Program directed by the Texas Department of Health; and

WHEREAS, Texas has consistently maintained an immunization rate ranging from 69.5 percent to 74.9 percent since 1995; and

WHEREAS, the Centers for Disease Control and Prevention has announced that the 2002 immunization rate for Texas is 71.3 percent, down from 74.9 percent in 2001, and that the decrease in immunization rates in Texas is unacceptable; and

WHEREAS, every single public health partner, every partner in the education and daycare community, and every Texan is affected by Texas' immunization rates in our state;

NOW, THEREFORE, I, Rick Perry, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following:

1. Focus on Immunizations. The Texas Department of Health shall expedite the implementation of legislation, which I signed and supported, that was passed by the 78th Regular Session of the Texas Legislature, to create comprehensive reforms to the public health infrastructure through which the immunization program in Texas is implemented. This legislation includes:

•House Bill No. 1920 which will improve access to immunizations by simplifying physicians' enrollment into the Vaccines for Children (VFC) program for which more than 70 percent of Texas children qualify. This legislation will increase access to immunizations by encouraging provider participation in VFC and directing the Texas Department of Health to develop education materials and continuing medical education programs relating to immunizations for physicians.

•House Bill No. 1921 which will improve access to immunizations by allowing the Department to improve the ImmTrac registry. This bill will help the Department target efforts to increase immunizations and will help consenting parents monitor their children's immunization records.

•Senate Bill No. 40 which will require the Department to develop an ongoing statewide education program to educate the public about the importance of fully immunizing children as well as the risks and contraindications that may be presented by immunizations.

•Senate Bill No. 43 which requires the Department to report to the Legislature by October 1, 2005, on the results of pilot programs designed to educate physicians regarding increasing immunization rates in communities that currently have lower than average immunization rates.

•Senate Bill No. 486 which will supplement the efforts of S.B. No. 40, by requiring the Department to develop new public-private partnerships and work with existing public-private partnerships to increase awareness of and support for early childhood immunizations. The Department and the Texas Education Agency will jointly apply for federal funds to create these partnerships with private and public, health, service and education organizations including parent-teacher associations, the United Way, chambers of commerce and athletic booster clubs. In addition, the bill will encourage other state agencies that have contact with families to include strategies for increasing childhood immunizations awareness within their strategic plans.

2. Business Improvement. The Texas Department of Health will continue and expedite the implementation of the recommendations for improvement of the Immunization Program, developed in the Business Improvement Review, developed by the Office of Business Improvement at the Texas Department of Health.

3. Emergency Rule Making. The Texas Department of Health shall implement through an emergency rule-making process the adoption by the Board of Health of the shot diptheria, tetanus and pertussis childhood vaccination schedule recommended by the Advisory Committee on Immunization Practices, which advises the U. S. Department of Health and Human Services and the Centers for Disease Control and Prevention on the most effective means to prevent vaccine-preventable diseases.

4. "Back to School." The Texas Department of Health will work with existing local community partners, partners in the medical community, partners in the education community, partners in the private business community, and partners in the pre-kindergarten and daycare communities to help educate the public on the importance of receiving childhood immunizations for children returning to school and their younger siblings through a "Back to School for Children and their Siblings" public awareness outreach effort throughout August 2003 and the coming 2004/2005 school year.

5. Increasing Public Awareness. The Texas Department of Health will unveil a public awareness and media campaign for television and radio to educate the public on the importance of children receiving appropriate immunizations for vaccine-preventable diseases. This campaign will initiate the statewide effort required under S.B. No. 40.

6. Cooperation. All affected agencies and other public entities that work with Texas families shall cooperate fully with the Texas Department of Health during the implementation and execution of this comprehensive plan to increase childhood immunizations.

This executive order supersedes all previous orders inconsistent with its terms and shall remain in effect and in full force until modified, amended, rescinded, or superseded by me or by a succeeding Governor.

Given under my hand this the 31st day of July, 2003.

Rick Perry, Governor

TRD-200305100

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PROCLAMATION 41-2969

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, federal law requires state legislatures to redraw congressional district lines after each decennial census; and

WHEREAS, the Texas legislature has not drawn new district lines to reflect the changes in Texas population since the results of the last census were released; and

WHEREAS, the people have placed the power to call and convene the legislature into special session in the hands of the Chief Executive Office of the State;

NOW, THEREFORE, I, RICK PERRY, GOVERNOR OF THE STATE OF TEXAS, by the authority vested in me by Article IV, Section 8, of the Texas Constitution, do hereby call a special session of the 78th Legislature, to be convened in the city of Austin, commencing at 3:15 p.m., Monday, the 28th day of July, 2003, for the following purpose:

To consider legislation relating to congressional redistricting.

The Secretary of State will take notice of this action and will notify the members of the Legislature.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 28th day of July, 2003.

Rick Perry, Governor

Attested By: Gwyn Shea, Secretary of State

Message

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE SEVENTY-EIGHTH TEXAS LEGISLATURE, SECOND CALLED SESSION:

WHEREAS, the people of Texas through their state Constitution have placed the power to call the legislature into special session in the hands of the Chief Executive Officer of the State; and

WHEREAS, the members of the Seventy-Eighth Texas Legislature, Second Called Session, have now convened to consider items presented to them by the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of the State of Texas, by the authority vested in me by Article IV, Section 8 and Article III, Section 40 of the Texas Constitution, do hereby present the following matter to the Seventy-Eighth Texas Legislature, Second Called Session for consideration:

Legislation relating to the financing, construction, improvement, maintenance, and operation of toll facilities by the Texas Department of Transportation and the disposition of money generated by the driver responsibility program, fines imposed for certain traffic offenses, and certain fees collected by the Department of Public Safety of the State of Texas; making an appropriation.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 28th day of July, 2003.

Rick Perry, Governor

Attested By: Gwyn Shea, Secretary of State

Message

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE SEVENTY-EIGHTH TEXAS LEGISLATURE, SECOND CALLED SESSION:

WHEREAS, the people of Texas through their state Constitution have placed the power to call the legislature into special session in the hands of the Chief Executive Officer of the State; and

WHEREAS, the members of the Seventy-Eighth Texas Legislature, Second Called Session, have now convened to consider items presented to them by the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of the State of Texas, by the authority vested in me by Article IV, Section 8 and Article III, Section 40 of the Texas Constitution, do hereby present the following matter to the Seventy-Eighth Texas Legislature, Second Called Session for consideration:

Legislation relating to state fiscal management, including adjustments to certain school district fiscal matters made necessary by recent changes in state fiscal management; making related appropriations.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 28th day of July, 2003.

Rick Perry, Governor

Attested By: Gwyn Shea, Secretary of State

Message

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE SEVENTY-EIGHTH TEXAS LEGISLATURE, SECOND CALLED SESSION:

WHEREAS, the people of Texas through their state Constitution have placed the power to call the legislature into special session in the hands of the Chief Executive Officer of the State; and

WHEREAS, the members of the Seventy-Eighth Texas Legislature, Second Called Session, have now convened to consider items presented to them by the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of the State of Texas, by the authority vested in me by Article IV, Section 8 and Article III, Section 40 of the Texas Constitution, do hereby present the following matter to the Seventy-Eighth Texas Legislature, Second Called Session for consideration:

To consider legislation relating to the reorganization of, efficiency in, and other reform measures applying to state government.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 28th day of July, 2003.

Rick Perry, Governor

Attested By: Gwyn Shea, Secretary of State

Message

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE SEVENTY-EIGHTH TEXAS LEGISLATURE, SECOND CALLED SESSION:

WHEREAS, the people of Texas through their state Constitution have placed the power to call the legislature into special session in the hands of the Chief Executive Officer of the State; and

WHEREAS, the members of the Seventy-Eighth Texas Legislature, Second Called Session, have now convened to consider items presented to them by the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of the State of Texas, by the authority vested in me by Article IV, Section 8 and Article III, Section 40 of the Texas Constitution, do hereby present the following matter to the Seventy-Eighth Texas Legislature, Second Called Session for consideration:

Legislation relating to the dates of certain elections, the procedures for canvassing the ballots for an election, and the counting of certain ballots voted by mail.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 29th day of July, 2003.

Rick Perry, Governor

Attested By: Gwyn Shea, Secretary of State

TRD-200305102

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THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Request for Opinions

RQ-0084-GA

Requestor:

The Honorable Ray Montgomery

District Attorney, Leon County

Post Office Drawer 1010

Centerville, Texas 75833

Re: Whether a county judge may sell oil and gas products to his county (Request No. 0084-GA)

Briefs requested by September 7, 2003

RQ-0085-GA

Requestor:

The Honorable Florence Shapiro

Chair, Committee on Education

Texas State Senate

P.O. Box 12068

Austin, Texas 78711

Re: Whether a municipality's contract with a company that operates a "sales tax billing office" may be entered into after May 27, 2003, the effective date of House Bill 3534 (Request No. 0085-GA)

RQ-0086-GA

Requestor:

The Honorable Michael J. Knight

Bee County Attorney

Bee County Courthouse, Room 204

105 West Corpus Christi Street

Beeville, Texas 78102

Re: Whether a school trustee may serve as an umpire at school district baseball games (Request No. 0086-GA)

Briefs requested by September 7, 2003

RQ-0087-GA

Requestor:

The Honorable Kenneth Armbrister

Chair, Committee on Natural Resources

Texas State Senate

P.O. Box 12068

Austin, Texas 78711

Re: Jurisdiction of a commissioners court over platted subdivision streets in a county of 50,000 or less (Request No. 0087-GA)

Briefs requested by September 7, 2003

RQ-0088-GA

Requestor:

Mr. Vernon M. Arrell, Commissioner

Texas Rehabilitation Commission

4900 North Lamar Boulevard

Austin, Texas 78751-2399

Re: Whether the statutory confidentiality of identifying information about clients of the Texas Rehabilitation Commission extends beyond an individual's death (Request No. 0088-GA)

Briefs requested by September 7, 2003

RQ-0089-GA

Requestor:

The Honorable Mike Stafford

Harris County Attorney

1019 Congress, 15th Floor

Houston, Texas 77002-1700

Re: Authority to execute a tax warrant (Request No. 0089-GA)

Briefs requested by September 8, 2003

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at 512/463-2110.

TRD-200305110

Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: August 13, 2003

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Request

AOR-503. The Texas Ethics Commission has been asked about the applicable reporting requirements in a situation in which a member of a candidate's campaign staff makes a campaign expenditure and later receives reimbursement from the candidate.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 36, Penal Code; and (8) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200304947
Sarah Woelk
General Counsel
Texas Ethics Commission
Filed: August 11, 2003

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 97. COMMUNICABLE DISEASES

SUBCHAPTER B. IMMUNIZATION REQUIREMENTS IN TEXAS ELEMENTARY AND SECONDARY SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION

25 TAC §97.63

The Texas Department of Health (department) adopts on an emergency basis an amendment to §97.63, concerning immunization requirements for children attending Texas child-care facilities and elementary schools regarding the DTaP requirement.

Pursuant to Government Code, §2001.034, the department finds that an imminent peril to the public health, safety, and welfare of children attending child-care facilities and elementary schools exists that requires adoption of this rule on fewer than 30 days notice. Recent outbreaks of pertussis throughout Texas have resulted in death and disability of children. There is currently no requirement for pertussis vaccination in children between the ages of 15 months and 5 years of age due to a publication error that was recently discovered. The absence of requirements for pertussis vaccination in children presents an imminent peril to the health and safety of children in Texas and warrants mandating adoption of the recommendations of the Advisory Committee on Immunization Practices (ACIP). This rule will also align the DTP/DTaP immunization requirements for Texas students with the most recent Recommended Childhood and Adolescent Immunization Schedule issued by the ACIP.

The department finds that the DTP/DTaP immunization requirements are necessary in order to prevent imminent peril and to protect the public health, safety, and welfare of children attending child-care facilities and elementary schools. The department also finds that not requiring the combination of doses of DTP/DTaP recommended by the Advisory Committee on Immunization Practices (ACIP) places the children attending child-care facilities and elementary schools in imminent peril. The department finds that requiring the addition of a fifth dose of DTP/DTaP to the immunization requirements for children four years of age or older is necessary to protect the public health, safety, and welfare of children attending child-care facilities and elementary schools.

The emergency rule is adopted under Health and Safety Code, §81.023, which requires the Board of Health (board) to develop immunization requirements for children; the immunization requirements are adopted as a statewide control measure for communicable disease as defined in Health and Safety Code, §§81.081 and 81.082; Education Code, §38.001, which allows the board to develop immunization requirements for admission to any elementary or secondary school; Human Resources Code, §42.043, which requires the department to make rules regarding the immunization of children admitted to child-care facilities; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The emergency rule affects Health and Safety Code, §81.023; Texas Education Code, §38.001; and Human Resource Code, §42.043.

§97.63. Required Immunizations.

(a) - (b) (No change.)

(c) The following immunizations are required in the respective age groupings. A child or student must meet all the immunizations requirements specific to an age group upon first entering the age group. Implementation of requirements for hepatitis B vaccine for adolescents and varicella vaccine and hepatitis A for all ages is contingent upon the appropriation of funds to the department for these purposes. By July 1 of each odd-numbered year, the department will publish a statement on whether or not these vaccines have been funded and are required as specified.

(1) Children less than five years of age: polio vaccine; diphtheria-tetanus-pertussis (DTP) or diphtheria-tetanus-acellular pertussis (DTaP) vaccine; measles, mumps, and rubella vaccine (MMR); Haemophilus influenzae type b conjugate vaccine (HibCV), hepatitis A, and varicella vaccine.

(A) - (E) (No change.)

(F) Children 15 months of age through four years of age, but not yet five years of age [~~(15 months through four years of age)~~]:

(i) (No change.)

(ii) any combination of DTP/DTaP will meet the following requirement:

(I) children 17 months of age and younger are required to have three doses of DTP/DTaP vaccine; and

(II) children 18 months of age through three years of age are required to have four doses of DTP/DTaP vaccine. Pediatric diphtheria-tetanus (DT) vaccine is an acceptable substitute for DTP/DTaP vaccine if pertussis vaccine is medically contraindicated; and

(III) children four years of age are required to have five doses of DTP/DTaP vaccine. The fifth dose is not necessary if

the fourth dose in the series is given on or after the fourth birthday. Pediatric diphtheria-tetanus (DT) vaccine is an acceptable substitute for DTP/DTaP vaccine if pertussis vaccine is medically contraindicated.

(iii) - (vi) (No change.)

(2) Children and students five years of age or older.

(A) (No change.)

(B) Diphtheria/Tetanus/Pertussis [~~Tetanus/Diphtheria~~].

(i) Five doses of a diphtheria-tetanus-pertussis containing vaccine in any combination are required. The fifth dose is not necessary if the fourth dose in the series is given on or after the fourth birthday. Pediatric diphtheria-tetanus (DT) vaccine is an acceptable substitute for DTP/DTaP vaccine if pertussis vaccine is medically contraindicated [~~Children and students six years of age and younger: at least four doses of DTP/DTaP, DT, or Td vaccine are required, provided at least one dose has been received on or after the fourth birthday. Pertussis vaccine is not required for children/students who are five years of age and older. Children with a medical contraindication to pertussis vaccine will need to have had only three doses of any combination of DTP/DTaP/DT/Td vaccines if their first dose was given on or after the first birthday and their third dose was given on or after the fourth birthday~~]. For further information see §97.77(c) and (d) of this title.

(ii) (No change.)

(C) - (H) (No change.)

(3) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304838
Susan K. Steeg
General Counsel
Texas Department of Health
Effective Date: August 7, 2003
Expiration Date: December 5, 2003
For further information, please call: (512) 458-7236

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 25. MEMBERSHIP CREDIT
SUBCHAPTER B. COMPENSATION

34 TAC §25.34

The Teacher Retirement System of Texas (TRS) adopts on an emergency basis new §25.34, concerning the administration of membership waiting period for public education employees. The proposed new section implements a waiting period before an individual is eligible to become a member of TRS. The new section is adopted on an emergency basis pursuant to §2001.034 of the Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. The section is also adopted in accordance with §2001.006 of the Government Code, which allows the agency to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect. The new section is simultaneously being proposed for permanent adoption in this issue of the *Texas Register*.

In accordance with House Bill 3459, 78th Legislature, Regular Session, the new section sets forth the requirement of a 90-day waiting period for an individual who is not a member of TRS, including through withdrawal of contributions, if the individual is employed on or after September 1, 2003, by an entity otherwise required to report its employees to TRS as members. The new section sets forth the eligibility for TRS membership for individuals who are subject to the waiting period; describes the date of employment for the purpose of administering the section; establishes how the waiting period is calculated, and addresses the effect of the waiting period on eligibility to elect participation in the Optional Retirement Program ("ORP") as an alternative to membership in TRS.

This emergency adoption is necessary because TRS and affected employers are required to comply with the relevant provisions of House Bill 3459, 78th Legislature, Regular Session, effective September 1, 2003, including preparation of communication for affected employees, modification of procedures, and programming of payroll systems to implement the new waiting period requirement. TRS finds that these requirements of state law require the adoption of the new section on fewer than 30 days notice. The agency has determined that this section is necessary and appropriate in accordance with Government Code §2001.006, which allows the agency to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect. However, the new section shall not become effective until the date the new law becomes effective: September 1, 2003.

The new section is adopted on an emergency basis under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for eligibility for membership. The new section is adopted under House Bill 3459, 78th Legislature, Regular Session, sections 43-44 and 73-74, which require a waiting period and otherwise address implementation of the waiting period. As described above, the section is also adopted under Government Code §2001.006 and Government Code §2001.034.

The other code provisions affected are Government Code, Chapter 822, §822.001 and Government Code, Chapter 823, §823.002.

§25.34. Administration of Membership Waiting Period.

(a) For an individual who begins employment on or after September 1, 2003, with an employer that is a TRS reporting entity and who is not a member of TRS as of the date of employment, eligibility for TRS pension plan membership begins on the first calendar day after the end of a 90 calendar day waiting period.

(b) For purposes of this section, an individual who is not considered to be a TRS member includes an individual who previously terminated membership in the retirement system through withdrawal of contributions and did not resume membership prior to a date of employment that is on or after September 1, 2003.

(c) In determining the date of eligibility for TRS pension plan membership for an employee who is subject to the waiting period, the following provisions apply:

(1) An employer shall count the date of employment as the first day of the 90-day waiting period.

(2) An employer shall count calendar days of an employment period on or after September 1, 2003, towards the waiting period, regardless of whether the days are in different school years.

(3) An employer shall count calendar days on or after September 1, 2003, during which the individual previously served as an employee with another TRS reporting entity towards the waiting period.

(4) An employer shall not count any calendar days between periods of employment towards the waiting period.

(5) Service provided by an employee on one calendar day to more than one employer that is a TRS reporting entity shall count as only one calendar day in the waiting period.

(6) Service of a type that would not otherwise qualify the employee for TRS membership may not fulfill any part of the waiting period requirement.

(d) For the purpose of administering this section, the date of employment means the date on which an employee begins to perform service for an employer that is a TRS reporting entity and the service is of a type that would otherwise qualify the employee for membership in the TRS pension plan, as provided under Subchapter A of this chapter (relating to Service Eligible for Membership) if the person were not subject to the waiting period described in this section.

(e) An employer shall submit member and other required contributions to TRS on compensation paid to an employee after the first date of the employee's eligibility for membership. For an employee subject to the waiting period, an employer's first report to TRS for the employee shall include the date of employment and the date on which the employee became eligible for TRS membership after the waiting period.

(f) An employer shall notify TRS immediately if it has failed to report an employee who was eligible for TRS membership and shall begin to report the employee as a member no later than the month immediately following the month in which the employer discovered the error. The employer shall correct any previous reports filed with TRS and make contributions and deposits as required by this title.

(g) Because participation in the Optional Retirement Program ("ORP") under Government Code, Chapter 830, is in lieu of participation in TRS, a person employed on or after September 1, 2003, and otherwise eligible to elect to participate in ORP must meet the TRS membership eligibility requirements, including the waiting period as applicable under this section, before the person may elect to participate in ORP. An election to participate in ORP must be made before the 91st day after becoming eligible to make the election, as required by Government Code, Chapter 830, §830.102, but may not be made before the date on which an employee is eligible for TRS membership.

(h) Upon request by TRS, an employer or an employee shall provide copies of, or otherwise make available, any records that TRS determines are necessary to administer this section.

(i) An employee who is subject to the waiting period specified in this section may be eligible to receive a year of TRS service credit if the employee is employed in a TRS-covered position and participates as a contributing member of TRS for the amount of time in a school year required by this title, including §25.1 of this title (relating to Full-Time Service) and §25.131 of this title (relating to Required Service). Employment service prior to the date on which a person is eligible for TRS membership under this section may not be used to meet the minimum requirements for service creditable in a school year unless a member purchases it in accordance with applicable requirements.

(j) This section is effective on September 1, 2003, and expires September 1, 2005, unless legislation is enacted extending the provisions of Government Code, Chapter 822, §822.001 and Government Code, Chapter 823, §823.002, as amended by House Bill 3459, 78th Legislature.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304892
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 542-6115

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE AND DEVELOPMENT

SUBCHAPTER G. CHILD CARE FOR PEOPLE TRANSITIONING OFF PUBLIC ASSISTANCE

The Texas Workforce Commission (Commission) adopts the emergency repeal of and new rules for Chapter 809, Child Care and Development, Subchapter G, Child Care for People Transitioning Off Public Assistance, §809.102 relating to Choices Child Care. These rules are adopted concurrent with the proposal of rules for public comment and appear in this issue of the *Texas Register.*

Purpose. The purpose of these rules is to implement House Bill 2292 enacted by the 78th Legislature, Regular Session, 2003, (HB 2292), which amends, in pertinent parts, Chapter 31, Texas Human Resources Code to incorporate the pay for performance model relating to Temporary Assistance for Needy Families (TANF) cash assistance and Medicaid assistance for the adult(s).

Background: Consistent with federal statutory authority, Chapter 31, Human Resources Code requires that individuals must engage in work activities in order to receive TANF cash assistance and Medicaid assistance for the adult(s) unless exempt from the work activities. The Commission is responsible for the employment and training requirements contained in Chapter 31 through the local workforce development boards (Boards) under Section 302.021(a)(5), Labor Code.

Testimony and legislative debate on HB 2292 centered in part on reinforcing the personal responsibility requirements relating to TANF cash assistance and Medicaid assistance for the adult(s) and to ensure that no state or federal funds are used to pay for assistance to individuals that fail to cooperate. This ensures that

families are cooperating in order to receive their cash assistance and supports the principle that the state should not support families who consistently refuse to cooperate.

HB 2292 also strengthened the linkages among the human services agencies by consolidating the twelve existing agencies within five agencies. The Health and Human Services Commission (HHSC), one of the five agencies, will oversee the operations of the remaining four agencies as well as the development of policies and rules. An oversight role of HHSC is to ensure that human services agencies are linking with the Commission to ensure that work opportunities for individuals are maximized and to ensure that individuals are cooperating with their mandatory work requirements. Such linkage ensures that opportunities are maximized to assist recipients obtaining and retaining employment through engaging in work activities where applicable.

The Commission has determined, consistent with the authority granted to states under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), that the definition of work activities includes cooperation with the Responsibility Agreement and the family employment plan. The specific statutory authority rests in 45 USCA Section 607 and is further clarified in the federal regulations interpreting those requirements, which state in part the following: 45 CFR Sections 261.10, relating to what work requirements must an individual meet, 64 Fed. Reg. 17767, (April 12, 1999) states that "the State defines the work activities that meet the [work] requirement." Likewise, the preamble at the same page also states that "[as] stated above, it is the State's prerogative and responsibility to define the activities it considers to meet these requirements...." Specifically, 45 CFR Section 261.12 (b) states that the individual responsibility plan "...should describe the obligations of the individual. These could include going to school, maintaining certain grades, keeping school-aged children in school, immunizing children, going to classes, or doing other things that will help the individual become or remain employed in the private sector." Based on this language and the principle of personal responsibility, the Commission has added a definition of "work activity" to clearly communicate the inclusion of the requirements specified in the Responsibility Agreement.

The current Responsibility Agreement used by the State of Texas requires the following:

*Participation in mandatory work activities;

*Cooperation with child support enforcement efforts to establish paternity and obtain child support;

*Remaining employed and not quitting a job without good cause;

*Maintenance of children's health and dental checkups;

*Maintenance of children's immunizations;

*School attendance, as required;

*Attendance at parenting skills training, when required;

*Abstention from using, possessing, or selling controlled substances;

*Abstention from alcohol abuse; and,

*Truthful representation of the recipient's situation.

Under the pay for performance model, the Legislature requires that a TANF family that does not cooperate with their required work activities will be sanctioned, resulting in the termination of the total amount of TANF cash assistance provided to the family. In addition, the Medicaid assistance for the adult(s) will be denied, unless the adult is under 19 years of age or pregnant.

The sanction period will last a minimum of one month, or until cooperation is demonstrated. If the sanction results from noncooperation with Choices, one month of demonstrated cooperation is required to reinstate receipt of the family's TANF cash assistance.

The Texas Department of Human Services (TDHS) will not reinstate the family's TANF cash assistance until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements are met. Furthermore, if a TANF recipient fails to cooperate for two consecutive months, the family's TANF case will be closed, and the family will be required to reapply for TANF cash assistance. Before certification, the conditional applicant will be required to attend a Workforce Orientation for Applicants (WOA) and to demonstrate one month of cooperation with Choices service requirements. TDHS will not process the family's TANF application until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements were met.

The Commission's intent is to ensure that failure to cooperate is not a result of circumstances that would have prevented Choices participation. Therefore, the Commission will continue to stress the importance of contacting individuals to determine whether a good cause reason for nonparticipation exists.

During the one-month period of demonstrated cooperation, support services will be available as needed. For that reason and consistent with new §31.0032, Human Resources Code as amended by HB 2292, §809.102 relating to Choices Child Care is changed to include that children of sanctioned families and conditional applicants that must demonstrate cooperation prior to the reinstatement of their TANF cash assistance are eligible to receive Choices Child Care.

These changes further align the receipt of cash assistance with employment, similar to the world of work, because employers pay their employees only after working for a specific period of time.

Timely Implementation. First, HB 2292 requires that the TDHS immediately apply a sanction terminating TANF cash assistance to or for a person or the person's family if TDHS or the Title IV-D agency determines that a person is not cooperating with the requirements of the Responsibility Agreement. Likewise, the law provides that the HHSC or any health and human services agency may deny Medicaid assistance effective September 1, 2003 for a person who is eligible for financial assistance, but fails to cooperate with the Responsibility Agreement unless specifically exempted. To effectuate the new law, the Commission's rule changes are required to be in place September 1, 2003.

Effective September 1, 2003, the Boards must notify TDHS of the demonstrated cooperation with Choices services requirements by sanctioned recipients and conditional applicants. Currently, as of July 2003, over 26,000 sanctioned families may be impacted as of September 1, 2003 if they fail to perform. The Boards are also required to develop policies and procedures to ensure that each Texas Workforce Center is prepared to respond to the sanctioned families' and conditional applicants' critical need to demonstrate cooperation with Choices services requirements. The Boards are required to ensure that the Texas

Workforce Centers timely notify TDHS of the demonstrated cooperation to ensure that TANF cash assistance and the Medicaid assistance for the adult(s) are issued. If Boards fail to implement such policies, those families cooperating would be in danger of losing TANF cash assistance and the adults' Medicaid assistance. If Boards do not ensure that Texas Workforce Centers have processes in place that allow TANF families to demonstrate cooperation, the continued loss of eligibility for the family's TANF cash assistance and the adults' Medicaid assistance will create an imminent peril to the public health and welfare of the family. The lack of timely policies will impact the families' receipt of cash and medical assistance, which are designed to meet the families' basic needs and health care needs of the adults in the families. Consequently, an emergency rule is necessary to implement the law by the September 1, 2003 effective date.

Second, the law requires that full family sanctions begin on September 1, 2003. The Commission's rule development was dependent upon coordination with the TDHS regarding implementation of the requirements of the new law by September 1, 2003. Due to the required coordination with the TDHS, the Commission's earliest opportunity to take timely action to approve the proposal of rules is August 5, 2003. Due to the posting schedule of the *Texas Register*, the proposal would be published on August 22, 2003. Accounting for the required thirty-day posting period, the earliest effective date would be September 22, 2003. Because the law requires that sanctions be immediately applied beginning September 1, 2003, an emergency rulemaking is necessary to meet that statutory deadline.

The importance of implementing the bill is expressly intended by the Legislature, effective September 1, 2003, and is paramount to ensuring the effective use of resources for families willing to cooperate with TANF work requirements.

For those reasons, the Commission finds that under Government Code §2001.034, these emergency rules must be adopted on fewer than thirty days of notice. The emergency rules become effective September 1, 2003. Concurrent with the adoption of the emergency rules, the Commission is publishing the proposal of the permanent changes to the rules to provide the public with a thirty-day opportunity to comment and will adopt those rules after considering public comment as soon as feasible following the comment period. The permanent rules will replace the emergency rules.

Although the rules are repealed in full and adopted as new, many of the provisions of the current rules are retained. For a copy of a comparison document of the existing rules with the emergency rules, please see the Commission web page at http://www.twc.state.tx.us/twcinfo/rules/prorules.html. To provide clarity to the rules, throughout the rules, technical modifications are made to update references to "recipients." This is done in conjunction with changes to the Choices definitions to clarify that sanctioned families and conditional applicants are considered mandatory individuals. Following is a more detailed explanation of the rule changes.

Under federal regulations, support services designed to meet a basic need, such as transportation, are classified as cash assistance when provided to an unemployed TANF recipient. The federal regulations do provide for an exception if such services are designed to be short term. Therefore, the rules clarify that these support services are classified as a short-term nonrecurrent benefit-that is, they are designed to last for less than four months and, therefore, are exempt from the federal definition of cash assistance.

For information about the Commission please visit our web page at www.twc.state.tx.us.

40 TAC §809.102

(Editor's note: The text of the following emergency adopted repeal will not be published. The section may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The emergency repeal is adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The repeal is also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As set forth regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§809.102. Choices Child Care

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304750
John Moore
General Counsel
Texas Workforce Commission
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 463-2573

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40 TAC §809.102

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§809.102. Choices Child Care.

(a) Children eligible to receive Choices child care include;

(1) children of TANF recipients participating in the Choices program as stipulated in Chapter 811 of this title; and

(2) children of sanctioned families and conditional applicants, as defined in Chapter 811 of this title, who must demonstrate cooperation prior to the resumption of TANF cash assistance as stipulated in Chapter 811 of this title.

(b) Child care shall be provided to children of parents participating in the Choices program as stipulated in Chapter 811 of this title, who need child care to accept employment and remain employed.

(c) Persons approved for Choices but waiting to enter an approved initial component of the program may receive up to two weeks of child care:

(1) when child care will prevent loss of the Choices placement, and

(2) if child care is available to meet the needs of the child and parent.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304751
John Moore
General Counsel
Texas Workforce Commission
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 463-2573

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CHAPTER 811. CHOICES

The Texas Workforce Commission (Commission) adopts the emergency repeal of Chapter 811. Choices, Subchapter A. General Provisions, §§811.1-811.3, Subchapter B. Access to Choices Services, §§811.11-811.14, Subchapter C. Choices Services, §§811.21-811.30, Subchapter D. Choices Work Activities, §§811.41-811.52, Subchapter E. Support Services and Other Initiatives, §§811.61-811.67, and Subchapter F. Appeals, §§811.71-811.73, and new rules for Chapter 811 Choices, Subchapter A. General Provisions, §§811.1-811.3, Subchapter B. Choices Services Responsibilities, §§811.11-811.16, Subchapter C. Choices Services, §§811.21-811.32, Subchapter D. Choices Work Activities, §§811.41-811.52, Subchapter E. Support Services and Other Initiatives, §§811.61-811.67, and Subchapter F. Appeals, §§811.71-811.73. These rules are adopted concurrent with the proposal of rules for public comment and appear in this issue of the *Texas Register*.

Purpose. The purpose of these rules is to implement House Bill 2292 enacted by the 78th Legislature, Regular Session, 2003, (HB 2292), which amends, in pertinent parts, Chapter 31, Texas Human Resources Code to incorporate the pay for performance model relating to Temporary Assistance for Needy Families (TANF) cash assistance and Medicaid assistance for the adult(s).

Background: Consistent with federal statutory authority, Chapter 31, Human Resources Code requires that individuals must engage in work activities in order to receive TANF cash assistance and Medicaid assistance for the adult(s) unless exempt from the work activities. The Commission is responsible for the employment and training requirements contained in Chapter 31 through the local workforce development boards (Boards) under Section 302.021(a)(5), Labor Code.

Testimony and legislative debate on HB 2292 centered in part on reinforcing the personal responsibility requirements relating to TANF cash assistance and Medicaid assistance for the adult(s) and to ensure that no state or federal funds are used to pay for assistance to individuals that fail to cooperate. This ensures that families are cooperating in order to receive their cash assistance and supports the principle that the state should not support families who consistently refuse to cooperate.

HB 2292 also strengthened the linkages among the human services agencies by consolidating the twelve existing agencies within five agencies. The Health and Human Services Commission (HHSC), one of the five agencies, will oversee the operations of the remaining four agencies as well as the development of policies and rules. An oversight role of HHSC is to ensure that human services agencies are linking with the Commission to ensure that work opportunities for individuals are maximized and to ensure that individuals are cooperating with their mandatory work requirements. Such linkage ensures that opportunities are maximized to assist recipients obtaining and retaining employment through engaging in work activities where applicable.

The Commission has determined, consistent with the authority granted to states under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), that the definition of work activities includes cooperation with the Responsibility Agreement and the family employment plan. The specific statutory authority rests in 45 USCA Section 607 and is further clarified in the federal regulations interpreting those requirements, which state in part the following: 45 CFR Sections 261.10, relating to what work requirements must an individual meet, 64 Fed. Reg. 17767, (April 12, 1999) states that "the State defines the work activities that meet the [work] requirement." Likewise, the preamble at the same page also states that "[as] stated above, it is the State's prerogative and responsibility to define the activities it considers to meet these requirements...." Specifically, 45 CFR Section 261.12 (b) states that the individual responsibility plan "...should describe the obligations of the individual. These could include going to school, maintaining certain grades, keeping school-aged children in school, immunizing children, going to classes, or doing other things that will help the individual become or remain employed in the private sector." Based on this language and the principle of personal responsibility, the Commission has added a definition of "work activity" to clearly communicate the inclusion of the requirements specified in the Responsibility Agreement.

The current Responsibility Agreement used by the State of Texas requires the following:

*Participation in mandatory work activities;

*Cooperation with child support enforcement efforts to establish paternity and obtain child support;

*Remaining employed and not quitting a job without good cause;

*Maintenance of children's health and dental checkups;

*Maintenance of children's immunizations;

*School attendance, as required;

*Attendance at parenting skills training, when required;

*Abstention from using, possessing, or selling controlled substances;

*Abstention from alcohol abuse; and,

*Truthful representation of the recipient's situation.

Under the pay for performance model, the Legislature requires that a TANF family that does not cooperate with their required work activities will be sanctioned, resulting in the termination of the total amount of TANF cash assistance provided to the family. In addition, the Medicaid assistance for the adult(s) will be denied, unless the adult is under 19 years of age or pregnant.

The sanction period will last a minimum of one month, or until cooperation is demonstrated. If the sanction results from noncooperation with Choices, one month of demonstrated cooperation is required to reinstate receipt of the family's TANF cash assistance.

The Texas Department of Human Services (TDHS) will not reinstate the family's TANF cash assistance until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements are met. Furthermore, if a TANF recipient fails to cooperate for two consecutive months, the family's TANF case will be closed, and the family will be required to reapply for TANF cash assistance. Before certification, the conditional applicant will be required to attend a Workforce Orientation for Applicants (WOA) and to demonstrate one month of cooperation with Choices service requirements. TDHS will not process the family's TANF application until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements were met.

The Commission's intent is to ensure that failure to cooperate is not a result of circumstances that would have prevented Choices participation. Therefore, the Commission will continue to stress the importance of contacting individuals to determine whether a good cause reason for nonparticipation exists.

During the one-month period of demonstrated cooperation, support services will be available as needed. For that reason and consistent with new §31.0032, Human Resources Code as amended by HB 2292, §809.102 relating to Choices Child Care is changed to include that children of sanctioned families and conditional applicants that must demonstrate cooperation prior to the reinstatement of their TANF cash assistance are eligible to receive Choices Child Care.

These changes further align the receipt of cash assistance with employment, similar to the world of work, because employers pay their employees only after working for a specific period of time.

Timely Implementation. First, HB 2292 requires that the TDHS immediately apply a sanction terminating TANF cash assistance to or for a person or the person's family if TDHS or the Title IV-D agency determines that a person is not cooperating with the requirements of the Responsibility Agreement. Likewise, the law provides that the HHSC or any health and human services agency may deny Medicaid assistance effective September 1, 2003 for a person who is eligible for financial assistance, but fails to cooperate with the Responsibility Agreement unless specifically exempted. To effectuate the new law, the Commission's rule changes are required to be in place September 1, 2003.

Effective September 1, 2003, the Boards must notify TDHS of the demonstrated cooperation with Choices services requirements by sanctioned recipients and conditional applicants. Currently, as of July 2003, over 26,000 sanctioned families may be impacted as of September 1, 2003 if they fail to perform. The Boards are also required to develop policies and procedures to ensure that each Texas Workforce Center is prepared to respond to the sanctioned families' and conditional applicants' critical need to demonstrate cooperation with Choices services requirements. The Boards are required to ensure that the Texas Workforce Centers timely notify TDHS of the demonstrated cooperation to ensure that TANF cash assistance and the Medicaid assistance for the adult(s) are issued. If Boards fail to implement such policies, those families cooperating would be in danger of losing TANF cash assistance and the adults' Medicaid assistance. If Boards do not ensure that Texas Workforce Centers have processes in place that allow TANF families to demonstrate cooperation, the continued loss of eligibility for the family's TANF cash assistance and the adults' Medicaid assistance will create an imminent peril to the public health and welfare of the family. The lack of timely policies will impact the families' receipt of cash and medical assistance, which are designed to meet the families' basic needs and health care needs of the adults in the families. Consequently, an emergency rule is necessary to implement the law by the September 1, 2003 effective date.

Second, the law requires that full family sanctions begin on September 1, 2003. The Commission's rule development was dependent upon coordination with the TDHS regarding implementation of the requirements of the new law by September 1, 2003. Due to the required coordination with the TDHS, the Commission's earliest opportunity to take timely action to approve the proposal of rules is August 5, 2003. Due to the posting schedule of the *Texas Register*, the proposal would be published on August 22, 2003. Accounting for the required thirty-day posting period, the earliest effective date would be September 22, 2003. Because the law requires that sanctions be immediately applied beginning September 1, 2003, an emergency rulemaking is necessary to meet that statutory deadline.

The importance of implementing the bill is expressly intended by the Legislature, effective September 1, 2003, and is paramount to ensuring the effective use of resources for families willing to cooperate with TANF work requirements.

For those reasons, the Commission finds that under Government Code §2001.034, these emergency rules must be adopted on fewer than thirty days of notice. The emergency rules become effective September 1, 2003. Concurrent with the adoption of the emergency rules, the Commission is publishing the proposal of the permanent changes to the rules to provide the public with a thirty-day opportunity to comment and will adopt those rules after considering public comment as soon as feasible following the comment period. The permanent rules will replace the emergency rules.

Although the rules are repealed in full and adopted as new, many of the provisions of the current rules are retained. For a copy of a comparison document of the existing rules with the emergency rules, please see the Commission web page at http://www.twc.state.tx.us/twcinfo/rules/prorules.html. To

provide clarity to the rules, throughout the rules, technical modifications are made to update references to "recipients." This is done in conjunction with changes to the Choices definitions to clarify that sanctioned families and conditional applicants are considered mandatory individuals. Following is a more detailed explanation of the rule changes.

Section 811.2 sets forth the definitions relating to Choices services. The following terms are added: "conditional applicant," "mandatory individual," "mandatory recipient," and "sanctioned family." The terms individual, applicant, recipient, and former recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

The Commission clarifies that a sanctioned family who must demonstrate one month of cooperation in the program month following the family's initial Choices noncooperation may or may not be receiving TANF cash assistance. Due to the TDHS automation schedule, penalties that are received after the TDHS "cut-off" date will not be effective in the following month. For example, in September, the TDHS cut-off date is September 17. If a recipient noncooperates in September and Workforce Center staff submit a penalty request on September 17, the effective date of the full-family sanction will be in November. However, the recipient must demonstrate cooperation throughout the month of October, which is the first program month after the month of noncooperation. During the month of October, the sanctioned family will still be receiving TANF cash assistance, and is considered mandatory; therefore, the sanctioned family will be in the Board's denominator for this month.

The term "work activity" is also added. Because of the fundamental barriers addressed in the Responsibility Agreement, the Commission has determined that inherent to the definition of work are the concepts included in the Responsibility Agreement which support a recipient's continued job readiness. Without cooperation with the Responsibility Agreement, the individual would be hindered in his or her ability to work or retain employment.

Section 811.3 sets forth Choices Service Strategies. The terms applicant, recipient, and former recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.11 sets forth Board Responsibilities. The terms applicant and recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations. The rules also require conditional applicants, who must demonstrate one month of cooperation with Choices and attend a WOA, to be enrolled immediately in Choices services.

Section 811.12 sets forth Applicant Responsibilities. The term applicant was reviewed for appropriateness and modified, if necessary, to describe the applicable populations. The rule clarifies that conditional applicants must attend a WOA.

Section 811.13 sets forth Responsibilities of Mandatory Individuals. The terms individual and recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.14 sets forth issues regarding Noncooperation. The provisions contain the same language set forth in §811.11, with the following changes. Timely and reasonable attempts must be made to contact recipients, sanctioned families, and conditional applicants to determine their reasons for noncooperation. If good cause is not determined, these individuals must be notified of their right to appeal. Additionally, recipients who were not in sanction status must be notified of the required procedures to demonstrate one month of cooperation prior to the reinstatement of their family's TANF cash assistance.

Section 811.15 sets forth issues regarding Demonstrated Cooperation. This section sets forth the requirements for sanctioned families and conditional applicants to demonstrate one month of cooperation prior to reinstating their family's TANF cash assistance.

Section 811.16 sets forth Good Cause for Mandatory Individuals. The term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. Families who must demonstrate one month of cooperation may receive good cause. If good cause is granted, TDHS shall be notified that the family demonstrated cooperation, and the family's TANF cash assistance may be reinstated.

Section 811.21 sets forth General Provisions for Choices services. This section adds language to address the impact of the Fair Labor Standards Act on sanctioned families and conditional applicants who are not receiving TANF cash assistance, and who may be participating in an unpaid work activity. The allowable number of hours in such activities will be based on the household's food stamp allotment divided by the minimum wage.

Section 811.22 sets forth Assessment provisions. The term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.23 sets forth provisions regarding the Family Employment Plan. The term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. In addition, new language is added to incorporate the requirements of the Responsibility Agreement in the Family Employment Plan. Adults in TANF families have the responsibility to ensure the health and welfare of their children. This has a direct impact on their ability to obtain and retain employment.

In sections 811.24-811.30 the term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. Sanctioned families are not subject to the four/six week job search limitation during the month in which they are not receiving TANF cash assistance. The four/six week limitation is only applicable to families who are receiving a TANF cash assistance.

Sections 811.31 and 811.32 set forth Special Provisions regarding Conditional Applicants and Sanctioned Families to require that any job search activities be staff assisted.

Section 811.41 regarding Job Search and Job Readiness Assistance includes a new description of staff-assisted services.

In §§811.45-811.50 the term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.51 regarding Post-Employment Services was reviewed. The terms recipient and former recipient were modified, if necessary, to describe the applicable populations.

Section 811.61 sets forth Support Services issues. The new language clarifies that any support service classified as cash assistance may only be provided for four months or less to an unemployed individual who is not already receiving cash assistance.

This section also contains language to clarify that conditional applicants and sanctioned families may receive necessary support services in order to demonstrate one month of cooperation.

Section 811.63(b) was removed because it applies to all support services, which is now located under §811.63.

Under federal regulations, support services designed to meet a basic need, such as transportation, are classified as cash assistance when provided to an unemployed TANF recipient. The federal regulations do provide for an exception if such services are designed to be short term. Therefore, the rules clarify that these support services are classified as a short-term nonrecurrent benefit-that is, they are designed to last for less than four months and, therefore, are exempt from the federal definition of cash assistance.

For information about the Commission please visit our web page at www.twc.state.tx.us.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§811.1 - 811.3

(Editor's note: The text of the following emergency adopted repeals will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The emergency repeal is adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The repeal is also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As set forth regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§811.1. Purpose and Goal.
§811.2. Definitions.
§811.3. Choices Service Strategy.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. ACCESS TO CHOICES SERVICES

40 TAC §§811.11 - 811.14

(Editor's note: The text of the following emergency adopted repeals will not be published. The sections may be examined in the offices of the Texas Workforce or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The emergency repeal is adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The repeal is also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As set forth regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§811.11. Board Responsibilities.
§811.12. Applicant Responsibilities.
§811.13. Recipient Responsibilities.
§811.14. Good Cause for Recipients.

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SUBCHAPTER C. CHOICES SERVICES

40 TAC §§811.21 - 811.30

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for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§811.21. General Provisions.
§811.22. Assessment.
§811.23. Family Employment Plan.
§811.24. Family Work Requirement Form for Two-Parent Families.
§811.25. TANF Core and TANF Non-Core Activities.
§811.26. Special Provisions Regarding Core and Non-Core Activities.
§811.27. Special Provisions for Teen Heads of Household.
§811.28. Special Provisions for Recipients in Single Parent Families with Children Under Age Six.
§811.29. Special Provisions Regarding Exempt Recipients Who Voluntarily Participate.
§811.30. Special Provisions Regarding Persons with Disabilities.

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SUBCHAPTER D. CHOICES WORK ACTIVITIES

40 TAC §§811.41 - 811.52

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The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§811.41. Job Search and Job Readiness Assistance.
§811.42. Unsubsidized Employment.
§811.43. Subsidized Employment.
§811.44. On-the-Job Training.
§811.45. Work Experience.
§811.46. Community Service.
§811.47. Child Care Services to a Recipient Participating in Community Service.
§811.48. Vocational Educational Training.
§811.49. Job Skills Training.
§811.50. Educational Services for Recipients Who Have Not Completed Secondary School or Received a Certificate of General Equivalence.
§811.51. Post-Employment Services.
§811.52. Parenting Skills Training.

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SUBCHAPTER E. SUPPORT SERVICES AND OTHER INITIATIVES

40 TAC §§811.61 - 811.67

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The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§811.61. Support Services.
§811.62. Child Care for Choices Individuals.
§811.63. Transportation.
§811.64. Work-Related Expenses.
§811.65. Wheels to Work.
§811.66. Certificate of General Equivalence (GED) Testing Payments.
§811.67. Individual Development Accounts (IDAs).

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SUBCHAPTER F. APPEALS

40 TAC §§811.71 - 811.73

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The emergency repeal affects Human Resources Code Title 2, particularly Chapters 31, 34 and 44, Human Resources Code.

§811.71. Board Review.

§811.72. Appeals to the Agency.

§811.73. Appeals to the Texas Department of Human Services (TDHS).

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SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§811.1 - 811.3

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.1. Purpose and Goal.

(a) The purposes of Temporary Assistance for Needy Families (TANF), as set forth in Title IV, Social Security Act, §401 (42 U.S.C.A. §601) are:

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;

(2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(3) prevent and reduce the incidence of out-of-wedlock pregnancies; and

(4) encourage the formation and maintenance of two-parent families.

(b) The goal of Choices services is to end the dependence of needy parents on public assistance by promoting job preparation, work, and marriage. A Board may exercise flexibility in providing services to Choices individuals to meet this Choices goal. A Board is also provided the flexibility and may engage in strategies that promote the prevention and reduction of out-of-wedlock pregnancies and encourage the formation and maintenance of two-parent families if those strategies support the primary goal of Choices services, which is employment and job retention.

(c) The goal of the Commission is to ensure delivery of the employment and training activities as described in the TANF State Plan.

(d) Boards shall identify the workforce needs of local employers and design Choices services to ensure that local employer needs are met and that the services are consistent with the goals and purposes of Choices services as referenced in this section, and as authorized by PRWORA, the applicable federal regulations at 45 C.F.R. Part 260 - 265, the TANF State Plan, this chapter, and consistent with a Board's approved integrated workforce training and services plan as referenced in §801.17 of this title.

(e) The effective date of the rules in this Chapter 811 relating to Choices services shall be September 1, 2003; however, until September 1, 2003, the rules in effect on July 1, 2003 shall apply to Choices services.

§811.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Applicant -- An adult, or teen head of household, in a family who applies for temporary cash assistance, who previously did not leave TANF in a sanctioned status.

(2) TDHS -- The Texas Department of Human Services.

(3) Earned Income Deduction (EID) -- A standard work-related and income deduction, available through the TDHS for four months, as defined in TDHS Rules, 40 TAC, §3.1003 to recipients who are employed at least 30 hours a week and earn at least $700 a month.

(4) Choices Individual -- An adult, or teen head of household, in a family who is an applicant, conditional applicant, recipient, former recipient, or sanctioned family as defined in this chapter.

(5) Conditional Applicant -- An adult, or teen head of household, in a family who left TANF in a sanctioned status, but who is reapplying for temporary cash assistance.

(6) Mandatory Individual -- An adult, or teen head of household, in a family who is a conditional applicant, mandatory recipient, or sanctioned family as defined in this chapter.

(7) PRWORA -- The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended.

(8) Recipient -- An adult, or teen head of household, in a family who receives temporary cash assistance, and includes:

(A) Exempt Recipient -- A recipient who is not required to participate in Choices services, as defined by TDHS Rules, 40 TAC, §3.1101;

(B) Extended TANF Recipient -- A recipient who receives TANF cash assistance past the 60-month time limit because of a hardship exemption as defined in TDHS Rules, 40 TAC, §3.6001;

(C) Former Recipient -- an adult, or teen head of household, in a family who no longer receives temporary cash assistance because of employment; or

(D) Mandatory Recipient -- An adult, or teen head of household, in a family, including extended TANF recipients who are required as defined by TDHS Rules, 40 TAC, §3.1101, and §3.6001, to participate in Choices services.

(9) Sanctioned Family -- An adult, or teen head of household, in a family who must demonstrate cooperation for one month in order to reinstate TANF benefits.

(10) Temporary cash assistance -- The cash grant provided through TDHS to individuals who meet certain residency, income, and resource criteria as provided under federal and state statutes and regulations, including the PRWORA, the TANF block grant statutes, the TANF State Plan, temporary cash assistance provided under Texas Human Resources Code Chapters 31 or 34, and other related regulations. This term is also referred to as "TANF cash assistance."

(11) Work Activity -- For the purposes of 45 USCA §607 and 45 CFR §261.10, work activities are defined as:

(A) all activities detailed in the Responsibility Agreement, as set forth in this chapter; and

(B) all TANF Core and Non-Core activities, as set forth in this chapter.

(12) Work-Based Services -- Includes those services defined in Human Resources Code §31.0126.

(13) Work Ready -- A Choices individual is considered work ready if he or she has the skills that are required by employers in the workforce area. A Board must ensure immediate access to the labor market to determine whether the Choices individual has those necessary skills to obtain employment.

§811.3. Choices Service Strategy.

(a) A Board shall ensure that its strategic planning process includes an analysis of the local labor market to:

(1) determine employers' needs;

(2) determine emerging and demand occupations; and

(3) identify employment opportunities, which includes those with a potential for career advancement.

(b) A Board shall set local policies for a Choices service strategy that coordinates various service delivery approaches to:

(1) assist applicants and conditional applicants in gaining employment as an alternative to public assistance;

(2) utilize a work first design as referenced in paragraph (2) of subsection (c) of this section to provide mandatory individuals, and exempt recipients who voluntarily participate in Choices services, access to the labor market; and

(3) assist former recipients in job retention and career advancement to remain independent of temporary cash assistance.

(c) The Choices service strategy shall include:

(1) Workforce Orientation for Applicants (WOA). As a condition of eligibility, applicants and conditional applicants are required to attend a workforce orientation that includes information on options available to allow them to enter the Texas workforce.

(2) Work First Design.

(A) The work first design:

(i) allows individuals to take immediate advantage of the labor market and secure employment, which is critical due to individual time-limited benefits; and

(ii) meets the needs of employers by linking individuals with skills that match those job requirements identified by the employer.

(B) Boards shall provide individuals access to other services and activities available through the One-Stop Service Delivery Network, which includes the WOA, to assist with employment in the labor market before certification for temporary cash assistance.

(C) Post-employment services shall be provided in order to assist an individual's progress towards self-sufficiency as described in paragraph (3) of subsection (c) of this section and §811.51 of this chapter.

(D) In order to assist an individual's progress toward self-sufficiency:

(i) Boards shall provide Choices individuals who are employed, including those receiving the EID, with information on available post-employment services; or

(ii) Boards may provide Choices individuals with post-employment services as determined by Board policy. The length of time these services may be provided is subject to §811.51 of this chapter.

(E) In order to assist employers, Boards shall coordinate with local employers to address needs related to:

(i) employee post-employment education or training;

(ii) employee child care, transportation or other support services available to obtain and retain employment; and

(iii) employer tax credits.

(F) A Board shall ensure that a family employment plan is based on employer needs, individual skills and abilities, and individual time limits for temporary cash assistance.

(3) Post-Employment Services. A Board shall ensure that post-employment services are designed to assist individuals with job retention, career advancement and reemployment, as defined in §811.51 of this chapter. Post-employment services are a continuum in the Choices service strategy to support an individual's progression to self-sufficiency.

(4) Adult Services. A Board shall ensure that services for adults shall include activities individually designed to lead to employment and self-sufficiency as quickly as possible.

(5) Teen Services. A Board shall ensure that services for teen heads of household shall include assistance with completion of secondary school or a certificate of general equivalence and making the transition from school to employment, as described in §811.27 and §811.50 of this chapter.

(6) Individuals with Disabilities. A Board shall ensure that services for individuals with disabilities include reasonable accommodations to allow the individuals to access and participate in services, where applicable by law A Board shall ensure that Memoranda of Understanding (MOU) are established with the appropriate agencies to serve individuals with disabilities.

(7) Target Populations. A Board shall ensure that services are concentrated, as further defined in §811.11 (d) and (e) of this chapter, on the needs of the following:

(A) recipients who have 6 months or less remaining of their state TANF time limit, irrespective of any extension of time due to a hardship exemption;

(B) recipients who have twelve months or less remaining of their 60-month TANF time limit, irrespective of any extension of time due to a hardship exemption; and

(C) recipients who are Extended TANF Recipients.

(8) Local Flexibility. A Board may develop additional service strategies that are consistent with the goal and purpose of this chapter and the One-Stop Service Delivery Network.

(9) Local-Level MOU. A Board shall ensure the development of a local-level MOU in cooperation with TDHS for coordinated case management that is consistent with the MOU between TDHS and the Commission.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. CHOICES SERVICES RESPONSIBILITIES

40 TAC §§811.11 - 811.16

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.11. Board Responsibilities.

(a) A Board shall ensure that:

(1) procedures are developed, in conjunction with TDHS, to notify applicants and conditional applicants on the availability of regularly scheduled Workforce Orientations for Applicants (WOA) and alternative WOAs;

(2) the WOA is offered frequently enough to allow applicants and conditional applicants to comply with the TDHS requirement that gives applicants ten (10) calendar days to attend a WOA;

(3) during a regularly scheduled WOA or alternative WOA, applicants and conditional applicants are informed of:

(A) employment services available through the One-Stop Service Delivery Network to assist applicants in achieving self-sufficiency without the need for temporary cash assistance;

(B) benefits of becoming employed;

(C) impact of time-limited benefits;

(D) individual and parental responsibilities; and

(E) other services and activities, including education and training, available through the One-Stop Service Delivery Network;

(4) alternative WOAs are developed that allow applicants and conditional applicants with extraordinary circumstances to receive the information listed in §811.11(a)(3) of this subsection;

(5) procedures are developed to notify TDHS of applicants and conditional applicants who contacted the Board's workforce centers to request alternative WOAs;

(6) verification that applicants and conditional applicants attend a scheduled or alternative WOA is completed and TDHS is notified in accordance with TDHS rule, 40 T.A.C. §3.7301; and

(7) applicants and conditional applicants are provided with an appointment to develop a family employment plan.

(b) A Board shall ensure that:

(1) Choices services are offered to applicants who attend a WOA.

(2) Conditional applicants who attend a WOA are immediately scheduled to begin Choices services.

(c) A Board shall ensure that recipient status is verified monthly.

(d) A Board shall develop policies and procedures to ensure that services are concentrated on individuals approaching their state or federal time limit, as identified in §811.3(c)(7)(A) and (B) of this chapter. Concentrated services may include targeted outreach, enhanced analysis of circumstances that may limit a recipient's ability to participate, and targeted job development.

(e) A Board shall ensure that all Extended TANF Recipients are outreached and offered the opportunity to participate in Choices activities.

(f) A Board shall ensure that post-employment services, including job retention and career advancement services, are available to Choices individuals including those receiving EID.

(g) A Board shall ensure that the monitoring of Choices requirements and activities is ongoing and frequent, as determined by a Board, and consists of the following:

(1) ensuring receipt of support services

(2) tracking and reporting of support services;

(3) tracking and reporting actual hours of participation, at least monthly;

(4) determining and arranging for any intervention needed to assist the individual in complying with Choices service requirements;

(5) ensuring that the individual is progressing toward achieving the goals and objectives in the family employment plan; and

(6) monitoring all other participation requirements.

(h) A Board shall ensure that:

(1) no less than four hours of training regarding family violence is provided to staff who:

(A) provide information to Choices individuals;

(B) recommend penalties or grant good cause; or

(C) provide employment planning or employment retention services;

(2) Choices individuals who are identified as being victims of family violence are referred to an individual or an agency that specializes in issues involving family violence.

(i) A Board shall ensure that documentation is obtained and maintained regarding all contact with Choices individuals and data entered into TWIST.

§811.12. Applicant Responsibilities.

Applicants and conditional applicants are required to attend a scheduled or an alternative WOA, in accordance with TDHS rule 40 T.A.C. §§3.7301-3.7302.

§811.13. Responsibilities of Mandatory Individuals.

(a) A Board shall ensure that mandatory individuals, and exempt recipients who voluntarily participate in Choices services, comply with the provisions contained in this section.

(b) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall:

(1) accept a job offer at the earliest possible opportunity;

(2) participate in or receive ancillary services necessary to enable mandatory individuals to work or participate in employment-related activities, including counseling, treatment, vocational or physical rehabilitation, and medical or health services;

(3) report hours of participation in component activities, including hours of employment; and

(4) attend scheduled appointments.

(c) Within two-parent families, mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall participate in assessment and family employment planning appointments and assigned employment and training activities as follows:

(1) participate in Choices employment and training as specified in §811.25(c)-(d) of this chapter;

(2) comply with requirements regarding core and non-core activities, as specified in §§811.25-811.30 of this chapter; and

(3) sign a form that contains all the information identified in the Commission's Family Work Requirement form, as described in §811.24 of this chapter.

(d) Within single-parent families, mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall participate in assessment and employment planning appointments and assigned employment and training activities as follows:

(1) participate in Choices employment and training activities as specified in §811.25(b) of this chapter; and

(2) comply with requirements regarding core and non-core activities, as specified in §§811.25-811.30 of this chapter.

(e) A Board shall ensure that recipients who elect to receive the EID through TDHS:

(1) report actual hours of work to a Board; and

(2) are provided with information on available post-employment services.

§811.14. Noncooperation.

(a) A Board shall ensure that cooperation by mandatory individuals with Choices requirements is verified each month to ensure that the individuals:

(1) comply with Choices services requirements as set forth in the family employment plan, unless the recipient is exempted by TDHS;

(2) have good cause as described in this chapter; or

(3) have not cooperated with Choices requirements and a penalty is requested.

(b) A Board shall ensure that timely and reasonable attempts, as defined by the Board, are made to contact a recipient prior to initiating a penalty to:

(1) determine the reason for noncooperation;

(2) inform the recipient of:

(A) the violation, if good cause has not been determined;

(B) the right to appeal; and

(C) the necessary procedures to demonstrate cooperation.

(c) A Board shall ensure that timely and reasonable attempts, as defined by the Board, are made to contact a sanctioned family and

conditional applicants upon discovery of noncooperation to determine if good cause exists.

(d) A Board shall ensure that the reasonable attempts to contact a mandatory individual are documented.

(e) A Board shall ensure that TDHS is notified of:

(1) a recipient's failure to comply with Choices services requirements; and

(2) that the noncooperation is submitted as early as possible in the same month in which the noncooperation occurs.

§811.15. Demonstrated Cooperation.

(a) Conditional applicants are required to demonstrate one month of cooperation to become eligible for reinstatement of TANF benefits.

(b) Sanctioned families are required to demonstrate one month of cooperation as a condition of eligibility for TANF benefits.

(c) A Board shall ensure that TDHS is immediately notified if:

(1) a sanctioned family denied TANF benefits because of one month of noncooperation has demonstrated full cooperation with Choices requirements for the program month immediately following the program month in which the family noncooperated;

(2) a conditional applicant whose TANF case is closed because of two or more months of noncooperation has demonstrated full cooperation with Choices requirements for four consecutive weeks; or

(3) a sanctioned family or conditional applicant has been granted good cause during the demonstrated cooperation period.

§811.16. Good Cause for Mandatory Individuals.

(a) Good cause applies only to mandatory individuals, and exempt recipients who voluntarily participate in Choices services. A Board shall ensure that good cause is determined as provided in this chapter.

(b) A Board shall ensure that a good cause determination:

(1) is based on individual and family circumstances;

(2) is based on face-to-face or telephone contact;

(3) covers a temporary period when mandatory individuals, or exempt recipients who voluntarily participate in Choices services, may be unable to attend scheduled appointments or participate in ongoing work activities;

(4) is made at the time the change in circumstances is made known to the Board's service provider; and

(5) is conditional upon efforts to address circumstances that limit the ability to participate in Choices services as required in the Responsibility Agreement.

(c) The following reasons may constitute good cause for purposes of this chapter:

(1) temporary illness or incapacitation;

(2) court appearance;

(3) caring for a physically or mentally disabled household member who requires the recipient's presence in the home;

(4) a demonstration that there is:

(A) no available transportation and the distance prohibits walking; or

(B) no available job within reasonable commuting distance, as defined by the Board;

(5) an inability to obtain needed child care, as defined by the Board and based on the following reasons:

(A) informal child care by a relative or under other arrangements is unavailable or unsuitable, and based on, where applicable, Board policy regarding child care as specified in §811.47 of this chapter. Informal child care may also be determined unsuitable by the parent;

(B) eligible formal child care providers are unavailable, as defined in Chapter 809 of this title;

(C) affordable formal child care arrangements within maximum rates established by the Board are unavailable; and

(D) formal or informal child care within a reasonable distance from home or the work site is unavailable;

(6) is without other support services necessary for participation;

(7) receives a job referral that results in an offer below the federal minimum wage, except when a lower wage is permissible under federal minimum wage law;

(8) is in a family crisis or a family circumstance that may preclude participation, including substance abuse, and mental health, provided the mandatory individual, or exempt recipient who voluntarily participates in Choices services, engages in problem resolution through appropriate referrals for counseling and support services; or

(9) is a victim of family violence.

(d) A Board shall promulgate policies and procedures for determining a family's inability to obtain child care and shall ensure that mandatory individuals in single-parent families caring for children under age six are informed of:

(1) the penalty exception to the family work requirement, including the criteria and applicable definitions for determining whether a mandatory individual has demonstrated an inability to obtain needed child care, as defined in §811.16(c)(5)(A)-(D) of this section.

(2) a Board's policy and procedures for determining a family's inability to obtain needed child care, and any other requirements or procedures, such as fair hearings, associated with this provision, as required by 45 CFR §261.56.

(e) A Board shall ensure that good cause:

(1) is reevaluated at least on a monthly basis;

(2) is extended if the circumstances giving rise to the good cause exception are not resolved after available resources to remedy the situation have been considered; and

(3) that is based on the existence of family violence does not exceed a total of twelve consecutive months per occurrence .

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304730

John Moore
General Counsel
Texas Workforce Commission
Effective Date: September 1, 2003
Expiration Date: December 30, 2003
For further information, please call: (512) 463-2573

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SUBCHAPTER C. CHOICES SERVICES

40 TAC §§811.21 - 811.32

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.21. General Provisions.

(a) A Board shall ensure that services are available to assist Choices individuals with obtaining employment as quickly as possible and, if employed, with retaining employment. These services may include:

(1) job readiness and job search-related services;

(2) work-based services;

(3) post-employment services;

(4) education and training services as described in this chapter; and

(5) support services.

(b) A Board shall ensure that employment and training activities are conducted in compliance with the Fair Labor Standards Act (FLSA) as follows:

(1) the amount of time per week that a recipient may be required to participate in activities that are not exempt from minimum wage and overtime under the FLSA shall be determined by the temporary cash assistance and food stamp benefits amount being divided by the minimum wage so that the amount paid to the recipient would be equal to or more than the amount required for payment of wages, including minimum wage and overtime; or

(2) the amount of time per week that a sanctioned family or conditional applicant may be required to participate in activities that are not exempt from minimum wage and overtime under the FLSA shall be determined by the food stamp benefits amount being divided by the minimum wage so that the amount paid to the sanctioned individual would be equal to or more than the amount required for payment of wages, including minimum wage and overtime; and

(3) if a Board provides activities that meet all of the following categories set forth in this paragraph, the activity is considered "training" under the FLSA and minimum wage and overtime is not required:

(A) the training is similar to that given in a vocational school;

(B) the training is for the benefit of the trainees;

(C) trainees do not displace regular employees;

(D) employers derive no immediate advantage from trainees' activities;

(E) trainees are not entitled to a job after training is completed; and

(F) employers and trainees understand that trainee is not paid.

(c) A Board shall ensure that placement in work-based services does not result in the displacement of currently employed workers or impair existing contracts for services or collective bargaining agreements.

(d) A Board may, through local policies and procedures, require the use of the Eligible Training Provider Certification System (ETPS) and Individual Training Account (ITA) systems as described in 40 T.A.C. Chapter 841 to provide for Choices services for individuals participating in Choices services and paid for with TANF funds.

(e) A Board shall, through local policies and procedures, make available job development services, which include:

(1) contacting local employers or industry associations to request that job openings be listed with Texas Workforce Centers, and other entities in the One-Stop Service Delivery Network selected by the Board;

(2) identifying the hiring needs of employers;

(3) assisting the employer in creating new positions for job seekers based on the job developer's and employer's analysis of the employer's business needs; or

(4) finding opportunities with an employer for a specific job seeker or a group of job seekers.

(f) A Board shall ensure that job development services identify, at a minimum, job openings for current mandatory individuals.

(g) A Board shall, through local policies and procedures, make available job placement services. Job placement services shall include:

(1) identifying employers' workforce needs;

(2) identifying job seekers who have sufficient skills and abilities to be successfully linked with employment; and

(3) matching the skills of the job seeker pool to the hiring needs of local employers.

§811.22. Assessment.

(a) A Board shall ensure that initial and ongoing assessments are performed to determine the employability and retention needs of Choices individuals as follows:

(1) An assessment is required for mandatory individuals, and for exempt recipients who voluntarily participate in Choices services, and who are:

(A) at least age 18; or

(B) heads of household, as determined by TDHS, who are not yet age 18, have not completed secondary school or received

a certificate of general equivalence, and are not attending secondary school.

(2) An assessment shall be provided to applicants who choose to participate in Choices services.

(3) Ongoing assessments shall be provided to former recipients who choose to participate in Choices services.

(b) Assessments shall include evaluations of strengths and potential barriers to obtaining and retaining employment, such as:

(1) skills and abilities, employment, and educational history in relation to employers' workforce needs in the local labor market;

(2) support services needs; and

(3) family circumstances that may affect participation, including the existence of family violence, substance abuse, and mental health, or the need for parenting skills training, as one of the factors considered in evaluating employability.

(c) For mandatory individuals who are at least age 18, or who are heads of household but are not yet age 18 and have not completed secondary school or received a certificate of general equivalence and are not attending secondary school:

(1) The assessments shall also include evaluations of the mandatory individual's:

(A) vocational and educational skills, experience, and needs; and

(B) literacy level by using a statewide standard literacy assessment instrument with the following exception: recipients receiving the EID are excluded from the literacy assessment. A Board shall ensure that the grade-level results or other literacy information is provided to TDHS for use in determining the appropriateness of the initial state time-limit designation for temporary cash assistance as described in the Texas Human Resources Code §31.0065, relating to state time-limited benefits.

(2) The grade-level results or other literacy information are provided to TDHS for use in determining the appropriateness of the initial state time-limit designation for temporary cash assistance as described in the Texas Human Resources Code §31.0065, relating to state time-limited benefits.

(d) Assessment Outcome. Assessments shall result in the development of a family employment plan, as described in §811.23 of this subchapter.

§811.23. Family Employment Plan.

(a) Boards must ensure that prior to the development of a family employment plan, mandatory individuals receive general information about services provided through the One-Stop Service Delivery Network that will assist them in obtaining employment, if the recipient did not receive this information during the WOA.

(b) Family employment plans are required for mandatory individuals, and exempt recipients who voluntarily participate in Choices services.

(c) Family employment plans shall be developed with applicants and former recipients who choose to participate in Choices services.

(d) A Board shall ensure that a family employment plan is developed during the assessment and:

(1) is based on assessments, as described in §811.22 of this subchapter;

(2) contains the goal of self-sufficiency through employment to meet the needs of the local labor market;

(3) contains the steps and services to achieve the goal, including:

(A) connecting the job seeker immediately to the local labor market;

(B) addressing potential barriers that limit the job seeker's ability to work or participate in activities;

(C) arranging support services for the job seeker or the family to address circumstances that limit the individual's ability to work or participate, including services for family violence;

(D) providing post-employment skill enhancement and career advancement; and

(E) requiring mandatory individuals to notify the Board's service provider of changes in family circumstances that may preclude participation in Choices services.

(4) is signed by the Choices individual, unless the Choices individual is a recipient receiving the EID, and a Board's service provider; and

(5) assigns required hours and sets forth the participation agreement for compliance with Choices services requirements. Family employment plans for two-parent families must include a description of how the required hours of participation will be distributed between one or both adults in the two-parent household.

(e) A Board shall ensure that the family employment plan contains the responsibilities listed in the Responsibility Agreement, which state that:

(1) each adult member of the household receiving cash assistance must participate as required in Choices;

(2) each family must cooperate with child support requirements to establish paternity and help obtain child support for children on their case;

(3) each adult or teen parent must not voluntarily quit a job without good cause;

(4) each child in the family must get a medical checkup as scheduled through the Texas Health Steps program;

(5) each child must be current with the required immunizations;

(6) each child receiving TANF who is younger than 18, or a teen parent younger than 19, must attend school regularly unless the child has a high school diploma or a GED;

(7) each TANF recipient must attend parenting skills classes, if requested to do so;

(8) each parent or relative of a child receiving assistance must not use, sell, or possess controlled substances or abuse alcohol after signing a Responsibility Agreement; and

(9) each family must truthfully represent their situation in completing the application, the interview, providing proof of its circumstance, reporting changes in address, income, assets, and family size, and by keeping or rescheduling all appointments.

(f) A Board shall ensure that the responsibilities in §811.23(e)(1) and (3) of this section are monitored for compliance.

(g) A Board shall ensure that progress towards meeting the goals of the family employment plan is evaluated and the family employment plan is modified as appropriate to meet employer needs in the local labor market.

§811.24. Family Work Requirement Form for Two-Parent Families.

A Board shall ensure that a Family Work Requirement form is developed for all two-parent families that:

(1) contains an agreement by both adults in the family to comply with the family work requirements through distribution of required hours of participation between one or both adults in the two-parent family; and

(2) is signed by the adults in the household that are required to participate in Choices services, except for the following:

(A) mandatory individuals who are temporarily unable to sign the form, such as a recipient who is temporarily unavailable; or

(B) recipients receiving the EID whose only participation requirement is to report their hours of employment.

§811.25. TANF Core and TANF Non-Core Activities.

(a) Participation hours are subject to the restrictions regarding TANF core and TANF non-core activities as set forth in 45 C.F.R. §261.31, §261.32 and §261.33, and as set forth in this section and §811.26 of this subchapter.

(1) TANF core activities are:

(A) job search and job readiness assistance, as described in §811.41 of this chapter;

(B) unsubsidized employment, as described in §811.42 of this chapter;

(C) subsidized employment, as described in §811.43 of this chapter;

(D) on-the-job training, as described in §811.44 of this chapter;

(E) work experience, as described in §811.45 of this chapter;

(F) community service, as described in §811.46 of this chapter;

(G) vocational educational training, as described in §811.48 of this chapter; or

(H) child care services to a mandatory recipient, or exempt recipient who voluntarily participates in Choices services, who is participating in community service, as described in §811.47 of this chapter.

(2) TANF non-core activities are:

(A) job skills training, as described in §811.49 of this chapter;

(B) educational services for mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who have not completed secondary school or received a certificate of general equivalence, as described in §811.50 of this chapter.

(b) A mandatory individual, and exempt recipient who voluntarily participate in Choices services, in a single-parent family is deemed to be engaged in work during the month if he or she participates for at least a minimum weekly average of thirty hours. An average of twenty hours per week must be derived from participation in core activities. Up to an average of ten hours per week may be derived from participation in non-core activities.

(c) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, in two-parent families who are not receiving Commission-funded child care are deemed to be engaged in work during the month if one or both adults in the family participate for at least a minimum weekly average of thirty-five hours. An average of thirty hours per week must be derived from participation in core activities. Up to an average of five hours per week may be derived from participation in non-core activities.

(d) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, in two-parent families who are receiving Commission-funded child care are deemed to be engaged in work during the month if one or both adults in the family participate for at least a minimum weekly average of fifty-five hours. An average of fifty hours per week must be derived from participation in core activities. Up to an average of five hours per week may be derived from participation in non-core activities. The following work participation exceptions apply to two-parent families who are receiving Commission-funded child care:

(1) two-parent families with one adult in good cause status are deemed to be engaged in work during the month if the adult who is not in good cause status participates for at least a minimum weekly average of thirty-five hours. An average of thirty hours per week must be derived from participation in core activities. Up to an average of five hours per week may be derived from participation in non-core activities; or

(2) two-parent families with both adults in good cause status for whom no penalty will be requested for failure to meet the minimum weekly average hours based on the good cause determination.

§811.26. Special Provisions Regarding Core and Non-Core Activities.

(a) Mandatory recipients, with the exception of those described in §811.27 and §811.30 of this subchapter, who are not in an employment activity after four weeks of participation in Choices services, must be placed into community service. Mandatory recipients who are not in an employment activity after reaching their six-week limit per federal fiscal year in job search and job readiness activities must be placed into community service. Mandatory recipients required to participate in a community service activity must be scheduled to participate no less than the minimum weekly average hours calculated as specified in §811.21 (b) of this subchapter.

(1) An employment activity is defined as:

(A) unsubsidized employment, as described in §811.42 of this chapter;

(B) subsidized employment, as described in §811.43 of this chapter;

(C) on-the-job training, as described in §811.44 of this chapter; or

(D) work experience, as described in §811.45 of this chapter.

(2) The number of hours that a recipient is required to participate in community service or another unpaid work activity, must be determined in compliance with the FSLA as described in §811.21(b) of this subchapter. If a recipient's hours of community service or other unpaid work activity are not sufficient to meet the core work activities requirement as set forth in §811.25 (b)-(d) of this subchapter, the recipient must be enrolled in additional core activities.

(b) Exempt recipients who voluntarily participate in Choices services are not subject to the requirements set forth in §811.26(a) of this section.

(c) Recipients participating in unsubsidized employment in §811.26(a)(1)(A) of this section who lose that employment may participate in job search and job readiness activities unless they have reached the six-week limit per federal fiscal year.

(d) Job search and job readiness activities, as defined in §811.41 of this chapter, are limited as follows:

(1) mandatory recipients, and exempt recipients who voluntarily participate in Choices services, may not be enrolled for more than 4 weeks of consecutive activity;

(2) mandatory recipients, and exempt recipients who voluntarily participate in Choices services, may not be enrolled for more than 6 weeks of total activity in a federal fiscal year;

(3) in order for a mandatory recipient to qualify for their remaining 2 weeks of job search and job readiness, they must first comply with §811.26(a) of this section, which requires that the mandatory recipient be engaged in an employment activity or in community service; and

(4) only once per federal fiscal year, may a partial week count as a full week of participation, per recipient.

(e) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, may not be enrolled in vocational education training, as defined in §811.48 of this chapter, for more than a cumulative total of 12 months.

(f) No more than thirty percent of mandatory individuals, and exempt recipients who voluntarily participate in Choices services, engaged in work activities in a month may be included in the Board's numerator because they are:

(1) participating in vocational educational training; and

(2) teen heads of household participating in educational activities as described in §811.27 of this subchapter.

(g) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall only be enrolled in core and non-core activities.

§811.27. Special Provisions for Teen Heads of Household.

(a) A Board must ensure that teen heads of household who have not completed secondary school or received a certificate of general equivalence are enrolled in educational activities as defined in §811.50 of this chapter.

(b) Teen heads of household who have not completed secondary school or received a certificate of general equivalence will count as engaged in work if they:

(1) maintain satisfactory attendance at a secondary school or the equivalent during the month as follows;

(A) during months in which school is in session, maintains satisfactory attendance;

(B) in months in which school is not in session, participates in allowable activities as described in §811.25 of this subchapter; or

(2) participate in education directly related to employment for an average of at least 20 hours per week during the month; or

(3) participate in Choices employment and training activities as specified in §811.25 of this subchapter.

§811.28. Special Provisions for Mandatory Individuals, and Exempt Recipients Who Voluntarily Participate in Choices Services, in Single-Parent Families with Children Under Age Six.

(a) A Board shall ensure that mandatory individuals, and exempt recipients who voluntarily participate in Choices services, in single-parent families with children under age six are notified of the penalty exception to Choices participation as described in §811.16(d) of this chapter.

(b) A mandatory individual, and exempt recipient who voluntarily participates in Choices services, in a single-parent family will count as engaged in work if he or she participates for at least an average of twenty hours per week in core activities.

§811.29. Special Provisions Regarding Exempt Recipients Who Voluntarily Participate.

Boards are not required to provide Choices services as set forth in §§811.25-811.30 of this subchapter to exempt recipients who fail to meet work requirements.

§811.30. Special Provisions Regarding Persons with Disabilities.

(a) Mandatory individuals who are disabled shall count as engaged in work to the extent that the individuals:

(1) participate in Choices employment and training activities for the time period and to the extent determined able as specified by a physician; or

(2) participate in activities as directed by the Texas Rehabilitation Commission or similar organization.

(b) Mandatory individuals needed at home to care for a disabled adult in the household shall count as engaged in work if the recipient participates in Choices services for a time period and to the extent determined able as specified by a physician.

(c) Mandatory individuals who are needed at home to care for an ill or disabled child in the household shall count as engaged in work if the recipient participates in Choices services for a time period and to the extent determined able as specified by a physician.

§811.31. Special Provisions Regarding Conditional Applicants.

A Board shall ensure that conditional applicants enrolled in job search activities, as described in this chapter, receive staff-assisted services.

§811.32. Special Provisions Regarding Sanctioned Families.

A Board shall ensure that sanctioned families enrolled in job search activities, as described in this chapter, receive staff-assisted services.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

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John Moore
General Counsel
Texas Workforce Commission
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For further information, please call: (512) 463-2573

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SUBCHAPTER D. CHOICES WORK ACTIVITIES

40 TAC §§811.41 - 811.52

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce

Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.41. Job Search and Job Readiness Assistance.

(a) Job search and job readiness are core activities as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that job search and job readiness services:

(1) incorporate the following:

(A) individual and group activities;

(B) staff-assisted services in which workforce center staff provide direction and guidance to job seekers, including appropriate referrals based on their skills and abilities and pre-scheduled job interviews; and

(C) client-directed activities.

(2) are limited to activities necessary for Choices individuals to secure immediate employment.

(3) provide individual assistance or coordinated, planned, and supervised activities that prepare Choices individuals for seeking employment, and including but are not limited to, the following:

(A) job skills assessment;

(B) job placement;

(C) counseling;

(D) information on available jobs;

(E) occupational exploration, including information on local emerging and demand occupations;

(F) interviewing skills and practice interviews;

(G) assistance with applications and resumes;

(H) job fairs;

(I) life skills; or

(J) guidance and motivation for development of positive work behaviors necessary for the labor market.

(4) are time-limited as defined in this subchapter.

§811.42. Unsubsidized Employment.

(a) Unsubsidized employment is a core activity as defined in §811.25(a)(1) of this chapter.

(b) Unsubsidized employment includes the following:

(1) full or part-time employment, in which wages are paid in full by the employer;

(2) unsubsidized internship with wages paid by the internship employer; and

(3) self-employment.

§811.43. Subsidized Employment.

(a) Subsidized employment is a core activity as defined in §811.25(a)(1) of this chapter.

(b) Subsidized employment is full or part-time employment that is subsidized in full or in part and complies with this section. Subsidized employment may occur in either the private sector or public sector. A Board shall not be the employer of record for Choices individuals enrolled in a subsidized employment activity. Subsidized employment includes but is not limited to the following:

(1) subsidized internship with a portion of the Choices individual's wages subsidized;

(2) subsidized employment with a staffing agency acting as the employer of record; and

(3) subsidized employment with the actual employer acting as the employer of record.

(c) Wages.

(1) Wages shall be at least federal or State minimum wage, whichever is higher. Boards must set a policy to establish the amount of the wage that is subsidized.

(2) Employers must provide the same wages and benefits to subsidized employees as for unsubsidized employees with similar skills, experience, and position.

§811.44. On-the-Job Training.

(a) On-the-job training is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made on a case-by-case basis whether to authorize, arrange, or refer a Choices individual for subsidized, time-limited training activities, to assist the Choices individual with obtaining knowledge and skills that are essential to the workplace while in a job setting. On-the-job training is training by an employer that is provided to a Choices individual while engaged in productive work in a job that:

(1) provides knowledge or skills essential to the full and adequate performance of the job;

(2) provides reimbursement to the employer of a percent of the wage rate of the Choices individual for the extraordinary costs of providing the training and additional supervision related to the training;

(3) is limited in duration as appropriate to the occupation for which the Choices individual is being trained, taking into account the content of the training, the prior work experience of the Choices individual, and the service strategy of the Choices individual, as appropriate; and

(4) includes training specified by the employer.

(c) Unsubsidized employment after satisfactory completion of the training is expected. A Board shall not contract with employers who have previously exhibited a pattern of failing to provide Choices individuals in on-the-job training with continued long-term employment, which provides wages, benefits, and working conditions that are equal to those that are provided to regular employees who have worked a similar length of time and are doing a similar type of work.

§811.45. Work Experience.

(a) Work experience is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made on a case-by-case basis whether to authorize, arrange, or refer mandatory individuals, and exempt recipients who voluntarily participate in Choices services, for unsalaried, work-based training positions in the private for-profit sector to improve the employability of a mandatory individual who has been unable to find employment.

(c) A Board shall ensure that all mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are unemployed after completing job search services are evaluated on an individual basis to determine if enrollment in work experience shall be required, based on available resources and the local labor market.

(d) A Board shall ensure that each work experience placement:

(1) is time-limited;

(2) is designed to move the mandatory individuals, and exempt recipients who voluntarily participate in Choices services, quickly into regular employment; and

(3) has designated hours, tasks, skills attainment objectives, and staff supervision.

(e) A Board shall ensure that entities that enter into non-financial agreements with a Board, identify work experience positions and provide job training and work experience within their organization. These positions shall enable mandatory individuals, and exempt recipients who voluntarily participate in Choices services, to gain the skills necessary to compete for positions within the entity as well as positions in the labor market.

§811.46. Community Service.

(a) Community service is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that all recipients subject to §811.26(a) of this chapter are referred to a community service program that provides employment or training activities to recipients through unsalaried, work-based positions in the public or private nonprofit sectors to improve the employability of recipients who have been unable to find employment.

§811.47. Child Care Services to a Mandatory Recipient, or Exempt Recipient Who Voluntarily Participates in Choices Services, Participating in Community Service.

(a) Child care services to a mandatory recipient, or exempt recipient who voluntarily participates in Choices services, participating in community service is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A mandatory recipient, or exempt recipient who voluntarily participates in Choices services, may provide child care services for another recipient who is engaged in a community service activity, as described in §811.46 of this subchapter. The hours spent by the recipient providing child care are considered a core activity. Boards that elect to allow this activity must set local policies which include:

(1) ensuring the health, safety and well-being of the children in care;

(2) limits on the maximum number of children that may be cared for; and

(3) the methodology and mechanism for reporting hours of participation by recipients.

§811.48. Vocational Educational Training.

(a) Vocational educational training is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made, on a case-by-case basis, whether to authorize, arrange, or refer Choices individuals for vocational educational training. Services provided by the Texas Rehabilitation Commission may be counted as vocational education training if the service provided to the Choices individual leads to employment.

(c) The vocational educational training shall:

(1) relate to the types of jobs available in the labor market;

(2) be consistent with employment goals identified in the family employment plan, when possible;

(3) be provided only if there is an expectation that employment will be secured upon completion of the training; and

(4) be subject to the time limitations as detailed in this subchapter.

(d) Boards may count up to 5 hours per week of study or homework time toward a mandatory individual, and exempt recipient who voluntarily participates in Choices services, family participation requirement if:

(1) study or homework time is directly correlated to the demands of the course work for out-of-class preparation as described by the educational institution;

(2) the educational institution's policy requires a certain number of out-of-class preparation hours for the class;

(3) study or homework time has been directly verified from the educational institution; and

(4) the mandatory individual, or exempt recipient who voluntarily participates in Choices services, is making progress as determined by the educational institution.

§811.49. Job Skills Training.

(a) Job skills training is a non-core activity as defined in §811.25(a)(2) of this chapter.

(b) Job skills training services are designed to increase a Choices individual's employability. Job skills training may also include activities ensuring that Choices individuals become familiar with workplace expectations and exhibit work behavior and attitudes necessary to compete successfully in the labor market. Various types of activities, which are directly related to employment, may qualify, such as personal development and preemployment classes.

(c) A Board shall ensure that a determination is made on a case-by-case basis whether to authorize, arrange, or refer Choices individuals for job skills training as set forth in the family employment plan.

(d) Job skills training shall be:

(1) directly related to employment; and

(2) consistent with employment goals identified in the family employment plan, when possible.

(e) Job skills training includes:

(1) Adult Basic Education (ABE), English-as-a-Second-Language (ESL), or Workforce Adult Literacy services;

(2) entrepreneurial training provided prior to business start up; and

(3) self-employment assistance:

(A) to Choices individuals currently engaged in operating a small business;

(B) to Choices individuals based upon an objective assessment process that identifies individuals who are likely to succeed; and

(C) which may include microenterprise services such as:

(i) business counseling;

(ii) financial assistance; and

(iii) technical assistance.

(f) Boards may count up to 5 hours per week of study or homework time toward a mandatory individual, and exempt recipient who voluntarily participates in Choices services, family participation requirement if:

(1) study or homework time is directly correlated to the demands of the course work for out-of-class preparation as described by the educational institution;

(2) the educational institution's policy requires a certain number of out-of-class preparation hours for the class;

(3) study or homework time has been directly verified from the educational institution; and

(4) the mandatory individual, or exempt recipient who voluntarily participates in Choices services, is making progress as determined by the educational institution.

§811.50. Educational Services for Mandatory Individuals, and Exempt Recipients who Voluntarily Participate in Choices Services, who have not Completed Secondary School or Received a Certificate of General Equivalence.

(a) Educational services are only available for mandatory individuals and exempt recipients who voluntarily participate in Choices services, who have not completed secondary school or who have not received a certificate of general equivalence as follows.

(1) Educational services for mandatory individuals, and exempt recipients who voluntarily participate in Choices services, age 20 or older are non-core activities as defined in §811.25(a)(2) of this chapter.

(2) Educational services for mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are teen heads of household age 19 and younger are core activities as defined in §811.27 of this chapter.

(b) A Board shall ensure that a determination is made, on a case-by-case basis, whether to authorize, arrange, or refer mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are age 20 and older for the following educational or other training services:

(1) secondary school leading to a high school diploma or a certificate of general equivalence;

(2) Workforce Adult Literacy; or

(3) other educational activities which are directly related to employment.

(c) Boards may count up to 5 hours per week of study or homework time toward a mandatory individual, and exempt recipient who voluntarily participates in Choices services, family participation requirement if:

(1) study or homework time is directly correlated to the demands of the course work for out-of-class preparation as described by the educational institution;

(2) the educational institution's policy requires a certain number of out-of-class preparation hours for the class;

(3) study or homework time has been directly verified from the educational institution; and

(4) the mandatory individual, or exempt recipient who voluntarily participates in Choices services, is making progress as determined by the educational institution.

§811.51. Post-Employment Services.

(a) A Board shall ensure that post-employment services, which include job retention, career advancement, and reemployment services, are offered to mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are employed, and to applicants and former recipients who have obtained employment but require additional assistance in retaining employment and achieving self-sufficiency.

(b) A Board shall ensure that post-employment services are monitored, and ensure that hours of employment are required and reported by mandatory recipients, and exempt recipients who voluntarily participate in Choices services, for at least the length of time the mandatory recipients, and exempt recipients who voluntarily participate in Choices services, receive temporary cash assistance.

(c) A Board shall ensure that ongoing contact is established with Choices individuals receiving post-employment services at least monthly.

(d) A Board may, through local policies and procedures, make post-employment services available to:

(1) former recipients who are denied temporary cash assistance because of earnings; and

(2) sanctioned families and conditional applicants who obtain employment during the one month of demonstrated cooperation.

(e) The post-employment services may include the following:

(1) assistance and support for the transition into employment through direct services or referrals to resources available in the workforce area;

(2) child care, if needed, as specified in rules at 40 T.A.C. Chapter 809;

(3) work-related expenses, including those identified in §811.64 of this chapter;

(4) transportation, if needed;

(5) job search, job placement, and job development services to help a former recipient who loses a job to obtain employment; or

(6) referrals to available education or training resources to increase an employed individual's skills or to help the individual qualify for advancement and long-term employment goals.

(f) The maximum length of time a former recipient, conditional applicant, and sanctioned family may receive services under this section is dependent upon:

(1) family circumstances;

(2) the risk of returning to public assistance. A person is considered at risk of returning to temporary cash assistance if he or she is a food stamp recipient, or receives Commission-funded child care;

(3) the ongoing need for these services; and

(4) the availability of funds for these services.

(g) Post-employment service providers may include employers, community colleges, technical colleges, proprietary schools, faith-based and community-based organizations.

§811.52. Parenting Skills Training.

A Board shall ensure that a determination is made, on a case-by-case basis and as determined during the assessments described in §811.22 of this chapter, whether to authorize, arrange, or refer Choices individuals for parenting skills training including one or more of the following: nutrition education, budgeting and life skills, and instruction on the necessity of physical and emotional safety for children.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200304732
John Moore
General Counsel
Texas Workforce Commission
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For further information, please call: (512) 463-2573

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SUBCHAPTER E. SUPPORT SERVICES AND OTHER INITIATIVES

40 TAC §§811.61 - 811.67

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.61. Support Services.

(a) A Board shall ensure that support services as specified in this subchapter are provided, if needed, to Choices individuals to address barriers to employment or participation in Choices services, subject to availability of resources and funding. A Board shall ensure that support services provided to Choices individuals are coordinated with the employer, when appropriate.

(b) A Board shall ensure that support services, including Commission-funded child care, are provided only to mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are meeting requirements set forth in §811.16, §811.23, §§811.25-811.30 of this chapter, and as set forth in §809.102 of this title. In applying this provision, a Board shall ensure support services are provided to a mandatory individual, and an exempt recipient who voluntarily participates in Choices services, if it is determined support services are needed to comply with requirements set forth in §811.16, §811.23, and §§811.25-811.30 of this chapter, and as set forth in §809.102 of this title.

(c) A Board shall ensure that:

(1) support services are terminated immediately upon a determination of a mandatory individual, or exempt recipient who voluntarily participates in Choices services, failure to meet Choices requirements, unless otherwise determined by the Board's service provider as referenced in subsection (b) of this section;

(2) the Board's child care service provider is notified immediately of the failure to meet Choices requirements; and

(3) upon notification, the Board's child care service provider immediately notifies the child care provider that services are terminating due to failure to meet Choices requirements.

(d) A Board shall ensure that support services, classified as cash assistance, for:

(1) applicants and former recipients do not extend beyond four months for those who are unemployed and not receiving temporary cash assistance; and

(2) unemployed conditional applicants and sanctioned families do not extend beyond the one month of demonstrated cooperation.

§811.62. Child Care for Choices Individuals.

(a) A Board shall ensure that child care is provided if needed, as specified in Chapter 809 of this title.

(b) Transitional child care is provided as needed, as specified in §809.101 of this title.

(c) Choices child care is provided as needed, as specified in §809.102 of this title.

(d) Applicant child care is provided as needed, as specified in §809.103 of this title.

§811.63. Transportation.

A Board shall ensure that transportation assistance shall:

(1) be provided if needed to enable a Choices individual to work, attend, and participate in required Choices services, or access necessary support services if alternative transportation resources are not available; and

(2) use the most economical means of transportation that meets the Choices individual's needs.

§811.64. Work-Related Expenses.

(a) If other resources are not available, work-related expenses necessary for Choices individuals to accept or retain specific and verified job offers that pay at least the federal minimum wage may be provided or reimbursed.

(b) A Board shall ensure that written policies are developed related to the methods and limitations for provision of work-related expenses.

(c) Work-related expenses may include: tools, uniforms, equipment, transportation, car repairs, housing or moving expenses, and the cost of vocationally required examinations or certificates.

§811.65. Wheels to Work.

(a) The Commission may develop a Wheels to Work initiative in which local nonprofit organizations provide automobiles for Choices individuals who have obtained employment but are unable to accept or retain the employment solely because of a lack of transportation.

(b) A Board may, through local policies and procedures, establish services to assist Choices individuals who verify the need for an automobile to accept or retain employment by referring them to available providers.

(c) Persons or organizations donating automobiles under a Wheels to Work initiative shall receive a charitable donation receipt for federal income tax purposes.

§811.66. Certificate of General Equivalence (GED) Testing Payments.

A Board shall ensure that the cost of certificate of GED testing and issuance of the certificate is paid through direct payments to the GED test centers and the Texas Education Agency for Choices individuals referred for testing by a Board's provider of Choices services.

§811.67. Individual Development Accounts (IDAs).

(a) A Board may set local policy and procedures to provide for implementation and oversight of IDAs under this section using TANF funds in accordance with 45 C.F.R. §§263.20-263.23. An IDA means an account established by, or for, an eligible individual to allow the individual to accumulate funds for specific purposes.

(b) A Board shall ensure that any IDAs created and matched with TANF funds are established and administered through a contract with a private nonprofit entity or through a state or local government entity acting in cooperation with a private nonprofit entity. The private nonprofit entity, or cooperating state or local entity, must coordinate with a financial institution in administering the accounts.

(c) Choices individuals may be eligible for IDAs if all of the requirements of this section are met.

(d) IDAs may be established for an eligible individual, and may be contributed to with the individual's earned income and up to fifty percent of the individual's federal Earned Income Tax Credit refund. Federal Earned Income Tax Credit refunds shall not be matched with TANF funds.

(e) Federal TANF funds, as well as public or private funds, may be used to provide matching funds for qualified expenses and to administer IDAs, and shall be expended in a manner consistent with applicable federal and state statutes and regulations, with the exception of federal Earned Income Tax Credit refunds.

(f) Use of funds in an individual's IDA, shall be in accordance with the Social Security Act §404(h) (42 U.S.C.A. §604(h)) and 45 C.F.R. §§263.20-263.23 and limited to expenses related to:

(1) postsecondary educational expenses;

(2) first home purchase; or

(3) business capitalization.

(g) A Board shall ensure that only qualified withdrawals are made by eligible individuals, and must develop policies and procedures to address unauthorized withdrawals, to include notification:

(1) to the individual that unauthorized withdrawals may impact the individual's eligibility for public assistance programs;

(2) to the individual of forfeiture of the entitlement to the matching funds for an unauthorized withdrawal; and

(3) to TDHS within seven working days of the unauthorized withdrawal.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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John Moore
General Counsel
Texas Workforce Commission
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SUBCHAPTER F. APPEALS

40 TAC §§811.71 - 811.73

The emergency new rules are adopted under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs. The rules are also adopted under Texas Government Code §2001.006, which provides authority for the Commission to adopt rules or take other administrative action that the agency determines is necessary and appropriate in preparation for the implementation of HB 2292 and rules relating to HB 2292 contained in 40 TAC Chapter 3. As outlined regarding the emergency rules, the Commission finds that adoption of the emergency rules is necessary and appropriate for implementation of HB 2292. Further, if HB 2292 were currently in effect, adoption of the rules would have been explicitly authorized by the law.

The rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.71. Board Review.

(a) The following may request a review by the respective Board:

(1) a Choices individual against whom an adverse action is taken by a Texas Workforce Center Partner; or

(2) a person who believes that a Choices individual has displaced the person from employment.

(b) A request for review shall be submitted in writing and delivered to a Board within 15 calendar days of the date of the adverse action. The request shall also contain:

(1) a concise statement of the disputed adverse action;

(2) a recommended resolution; and

(3) any supporting documentation the Choices individual deems relevant to the dispute.

(c) On receipt of a request for review, a Board shall coordinate a review by appropriate Board staff.

(d) The parties to the request for review are the aggrieved person, applicant, or individual and the Texas Workforce Center Partner.

(e) Additional information may be requested from the parties. Such information shall be provided within 15 calendar days of the request.

(f) Within 30 calendar days of the date the request for review is received or of the date that additional requested information is received by the reviewing Board staff member, a Board shall send the parties written notification of the results of the review.

§811.72. Appeals to the Agency.

(a) After results of a review have been issued, the party that disagrees with the outcome of the review may request an Agency hearing to appeal the results of the review.

(b) The request for appeal to the Agency from a Board's review shall be filed in writing with the Appeals Department, Texas Workforce Commission, 101 East 15th Street, Room 410, Austin, Texas 78778-0001, within 15 calendar days after receiving written notification of the results of the review.

(c) The appeal to the Agency shall include a hearing, which is limited to the issues and the information considered in a Board review.

(d) The Agency hearing shall be held in accordance with the procedures applicable to an appeal as contained in Chapter 823 of this title (relating to General Hearings).

§811.73. Appeals to the Texas Department of Human Services (TDHS).

A recipient who expresses dissatisfaction with a decision regarding the termination or reduction of his or her cash assistance benefits may appeal the decision to TDHS. If the termination or reduction of temporary cash assistance is based upon noncompliance with Choices requirements, a Board shall prepare and provide necessary information to TDHS.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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John Moore
General Counsel
Texas Workforce Commission
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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 78. ATHLETE AGENTS

SUBCHAPTER A. REGISTRATION

1 TAC §78.1, §78.11

The Office of the Secretary of State proposes amendments to Subchapter A, concerning athlete agent registrations by amending §78.1 and §78.11. The purpose of the amendments is to implement amendments to Chapter 2051 of the Occupations Code that were made by the 78th Texas Legislature in Senate Bill 292, which will be effective on September 1, 2003.

Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section has determined that for the first five year period that the proposed amendments are in effect there will be no fiscal implication for state government as a result of enforcing the amendments. There is no effect on local government, large businesses, small businesses or micro-businesses. There is no anticipated additional economic cost to individuals who are required to comply with the amendments as proposed. There is no anticipated impact on local employment.

Mr. Joyner also has determined that for each year of the first five years that the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be to clarify that, on or after September 1, 2003, an athlete agent who is registered or certified as an athlete agent in another state may register in this state by submitting a copy of that state's application.

Comments on the proposed amendments may be submitted to Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711-2887.

The amendments are proposed under the Texas Government Code, §2001.004(1) and §2001.006(b) and the Athlete Agents Act, Texas Occupations Code, §2051.051(b) which provide the Secretary of State with the authority to prescribe and adopt rules.

The amendment affects the Texas Occupations Code, §2051.101 and §2051.108.

§78.1. Registration of Athlete Agents.

(a) The application for registration will be accepted for filing only [~~once~~] upon submission of a completed registration form and payment of the applicable filing fee stated in §78.21 of this title (relating to Filing Fees).

(b) Except as provided in subsection (c) of this section, an application [~~Application~~] for an athlete agent shall be made on forms prescribed by the secretary of state [~~entitled registration of athlete agent~~]. The form or specifications pertaining to the prescribed form may be obtained by writing to the Statutory Documents Section, Office of the Secretary of State, P.O. Box 12887, Austin, Texas 78711. The form may also be found on the Secretary of State's website at www.sos.state.tx.us.

(c) A person who holds a certificate of registration or license as an athlete agent in another state may submit a copy of the other state application and certificate or license instead of submitting the application required by this section if the application to the other state:

(1) was submitted to the other state not earlier than the 180th day before the date the application is submitted in this state and the applicant certifies that the information contained in the application is current;

(2) contains information substantially similar to or more comprehensive than the information required by Chapter 2051 of the Occupations Code; and

(3) was signed by the applicant under penalty of perjury.

(d) [~~(c)~~] The registration under the Act is valid for one year from the date of issuance. When application for registration is made and the registration process has not been completed, the secretary of state may issue a provisional registration certificate valid for not more than 90 days.

(e) [~~(d)~~] An agent that is a corporation, an association, a partnership, a limited liability company, or other entity, and not an individual or sole proprietorship, shall file a statement setting forth the names and addresses of all individuals who will recruit or solicit an athlete to enter into an agent contract, a professional sports services contract, or a financial services contract with the agent. The statement shall be filed on a form prescribed by the secretary of state and available from the Statutory Documents Section referenced previously.

§78.11. Renewal for Registration of Athlete Agent.

(a) Except as provided in subsection (b) of this section, an application [~~Application~~] for renewal to be an athlete agent shall be made on forms prescribed by the secretary of state [~~entitled renewal application of athlete agent~~]. A copy of the prescribed form or the requirements of the prescribed form may be obtained by writing to the Statutory Documents Section, Office of the Secretary of State, P.O. Box 12887, Austin, Texas 78711. The form may also be found on the Secretary of State's website at www.sos.state.tx.us.

(b) A person who has submitted an application for renewal of registration or license as an athlete agent in another state may submit a copy of the application and certificate of registration or license from the other state instead of submitting the application required by this section. The secretary of state shall accept the application for renewal from the other state as an application for renewal under this section if the application to the other state:

(1) was submitted to the other state not earlier than the 180th day before the date the renewal application is submitted in this state and the applicant certifies that the information contained in the application is current;

(2) contains information substantially similar to or more comprehensive than the information required by Chapter 2051 of the Occupations Code; and

(3) was signed by the applicant under penalty of perjury.

(c) [~~(b)~~] A renewal application for an athlete agent shall be submitted to the secretary of state on or before the expiration of the registration term.

(d) [~~(c)~~] Renewal under the Act is valid for one year from the date of issuance. When application for renewal is made and the renewal process has not been completed, the secretary of state may issue a provisional renewal certificate valid for 90 days.

(e) [~~(d)~~] An agent that is a corporation, an association, a partnership, a limited liability company, or other entity, and not an individual or sole proprietorship, shall file a statement with the renewal application setting forth the names and addresses of all individuals who will recruit or solicit an athlete to enter into an agent contract, a professional sports services contract, or a financial services contract with the agent. The statement shall be filed on a form prescribed by the secretary of state and available from the Statutory Documents Section referenced previously.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200304792
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 475-0775

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SUBCHAPTER C. CONTRACTS

1 TAC §78.51

The Office of the Secretary of State proposes amendments to Subchapter C, concerning athlete agent contracts by amending §78.51. The purpose of the amendments is to implement amendments to Chapter 2051 of the Occupations Code that were made by the 78th Texas Legislature in Senate Bill 292, which will be effective on September 1, 2003.

Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section has determined that for the first five year period that the proposed amendments are in effect there will be no fiscal implication for state government as a result of enforcing the amendments. There is no effect on local government, large businesses, small businesses or micro-businesses. There is no anticipated additional economic cost to individuals who are required to comply with the amendments as proposed. There is no anticipated impact on local employment.

Mr. Joyner also has determined that for each year of the first five years that the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be to clarify the type of information that must be included in an athlete agent contract, on or after September 1, 2003.

Comments on the proposed amendments may be submitted to Guy Joyner, Chief, Legal Support Unit, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711-2887.

The amendments are proposed under the Texas Government Code, §2001.004(1) and §2001.006(b) and the Athlete Agents Act, Texas Occupations Code, §2051.051(b) which provide the Secretary of State with the authority to prescribe and adopt rules.

The amendments affect the Texas Occupations Code, §2051.203 and §2051.204.

§78.51. Contract Form.

(a) The secretary of state has the authority to approve the form of all agent and financial services contracts. All such contracts shall:

(1) include the amount and method of computing the fees the agent may charge to and collect from the athlete and a description of the various services to be rendered in return for each fee;

(2) specify any other consideration the athlete agent received or will receive from any other source for entering into the contract; or for providing the services;

(3) identify the name of any person not listed in the application for registration or renewal of registration who will be compensated because the athlete signed the contract;

(4) [~~(2)~~] contain the disclosure statements specified in the Athlete Agents Act, §5(b)(1), (2), (3), (4) and (5) [~~(3)~~];

(5) [~~(3)~~] indicate the date that the athlete signs the contract;

(6) [~~(4)~~] identify the institution of higher education where the athlete attended and participated in intercollegiate sports contests; and [~~.~~]

(7) specify the time-period covered by the contract.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.14

The Railroad Commission of Texas proposes to amend §3.14 relating to Plugging. The proposed amendment to §3.14(a)(1) eliminates current subparagraph (G) defining "individual well

bond" and re-letters current subparagraphs (H)-(O). The proposed amendments to §3.14(b)(2) reorganize and re-letter the current provisions of subparagraph (A) and make such provisions applicable to extension of the deadline for plugging inactive wells operated by unbonded operators regardless of the period of well inactivity. The proposed amendments to §3.14(b)(2) also eliminate current subparagraph (B) relating to plugging extensions for wells operated by unbonded operators that have been inactive for 36 months or longer, including the current requirement of §3.14(b)(2)(B)(i)(II) that an unbonded operator file an individual well bond in order to obtain an extension of the deadline for plugging a well that has been inactive for a period of 36 months or longer and the current provisions of §3.14(b)(2)(B)(ii) pertaining to standards and procedure to rebut presumed estimated plugging costs for the purpose of setting the amount of individual well bonds.

The proposed amendment to current §3.14(b)(2)(D)(i), re- lettered as proposed §3.14(b)(2)(C)(i), eliminates the current provision that the Commission or its delegate may revoke a plugging extension if the operator of the well that is the subject of the extension fails to obtain or maintain a valid individual well bond and provides instead that a plugging extension may be revoked if the operator fails to obtain or maintain financial security as required by §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed).

The proposed amendment to current §3.14(b)(2)(E), re- lettered as proposed §3.14(b)(2)(D), clarifies that the test required by current §3.14(b)(2)(E) for wells more than 25 years old and wells for which a plugging extension is sought must be a successful fluid level or hydraulic pressure test establishing that the well does not pose a potential threat of harm to natural resources, including surface and subsurface water, oil, and gas.

The proposed amendments also change clause (v) of current §3.14(b)(2)(E), re-lettered as §3.14(b)(2)(D), to provide that wells subject to the testing requirements of current §3.14(b)(2)(E) may not be returned to active operation unless a fluid level test of the well has been performed within 12 months prior to the return to activity or a mechanical integrity test of the well has been performed within 60 months prior to the return to activity. The amendments eliminate the current provision of clause (v) that wells that are returned to continuous production, as evidenced by three consecutive months of reported production of at least 10 barrels of oil or 100 mcf of gas per month, need not be tested.

The amendments to §3.14 eliminate references to individual well bonds and are proposed to conform §3.14 to amendments currently being proposed by the Commission to §3.78 of this title eliminating the requirement that unbonded operators file individual well bonds in order to obtain plugging extensions for wells that have been inactive for 36 months or more. In addition, the individual well bond requirements in §3.14(b)(2)(B)(i)(II) and §3.78(m)(1)(A)(2)-(3) were invalidated by Final Judgment of the 126th District Court of Travis County, Texas, signed July 15, 2003, in No. GN202946, *Ross H. Hardwick Oil Company Et Al. v. Railroad Commission of Texas*, based on the Court's determination that in adopting these requirements, the Commission failed to comply with Texas Government Code, §2006.002.

The Commission has determined that some operators have had difficulty in obtaining individual well bonds. In addition, the individual well bond requirement of §3.14 has made it impractical for some operators to file one of the alternate forms of financial security authorized by §3.78(d) of this title and Texas Natural Resources Code, §91.104. In some cases, the total amount of individual well bonds required under current §3.14 in order for an unbonded operator to obtain plugging extensions for wells that have been inactive for 36 months or more has exceeded the amount of individual or blanket performance bonds, letters of credit, or cash deposits required as financial security under §3.78 of this title.

Inability to obtain an individual or blanket performance bond, letter of credit, or cash deposit as financial security, coupled with the inability to file an alternate form of financial security because of the individual well bond requirement, has prevented some operators, even those with an acceptable record of compliance, from renewing their organization reports.

The Commission has determined that the individual well bond requirement of §3.14 can be eliminated without posing a significant risk to the Oil Field Clean Up Fund (OFCUF), particularly since under Texas Natural Resources Code, §91.104, effective September 1, 2004, all operators will be required to file an individual or blanket performance bond, letter of credit, or cash deposit as financial security covering all operations, and current individual well bond requirements for unbonded operators will be moot.

In the interim period prior to September 1, 2004, elimination of the individual well bond requirement will enable some operators that have had difficulty in filing financial security to elect to file one of the alternate forms of financial security permitted by §3.78(d) of this title in order to renew their organization reports. This will have the beneficial effect of allowing these operators to continue operations while preparing to meet the more stringent financial security requirements which will take effect September 1, 2004.

The Commission has determined that elimination of the individual well bond requirement of §3.14 for the short time that remains prior to September 1, 2004, will not pose a significant threat to the OFCUF or to surface or subsurface usable quality water because under §3.14, the Commission will not grant a plugging extension for an inactive well operated by an unbonded operator unless the well and associated facilities are in compliance with all laws and Commission rules; the operator's organization report is current and active; the operator has, and upon request provides evidence of, a good faith claim to a continuing right to operate the well; the operator has paid the proper fee provided by §3.78 of this title for obtaining the plugging extension; and the operator has tested the well in accordance with §3.14(b)(2)(E) and files with the application for the plugging extension a fluid level test conducted within 90 days prior to the application demonstrating that any fluid in the wellbore is at least 250 feet below the base of the deepest usable quality water stratum, or a hydraulic pressure test conducted during the period the well has been inactive and not more than four years prior to the date of the application demonstrating the mechanical integrity of the well.

The proposed amendment to current §3.14(b)(2)(E), re- lettered as §3.14(b)(2)(D), is simply a clarifying amendment and does not change current Commission policy and practice.

The proposed amendment eliminating clause (v) of current §3.14(b)(2)(E), re-lettered as §3.14(b)(2)(D), is necessary in the interest of ensuring that wells more than 25 years old that become inactive or wells for which a plugging extension is sought do not pose a threat of harm to natural resources, including surface and subsurface water, oil, and gas. The Commission has determined that once the testing requirements of §3.14(b)(2)(E) have attached, a well should not be returned

to active operation unless a fluid level test has been performed within 12 months prior to the return to activity or a mechanical integrity test has been performed within 60 months prior to the return to activity.

Leslie Savage, Administrative Planner, Planning and Administration, Oil and Gas Division has determined that for the first year of the first five years the proposed amendments will be in effect, there will be no net negative fiscal implications for state government as a result of enforcing or administering the amendments. The changes in individual well bond requirements proposed in these amendments will have effect for approximately one year (fiscal year 2004). Effective September 1, 2004, Texas Natural Resources Code, §91.104, requires that operators file an individual or blanket performance bond, letter of credit or cash deposit as financial security to cover all operations.

For the first year that the proposed amendments would be in effect, the Commission anticipates that the proposed amendments may result in a certain percentage of operators not currently active returning to active status by filing financial security in the form of a nonrefundable annual fee of $1,000 and paying a $300 filing fee for each inactive well in order to obtain plugging extensions. The Commission estimates that approximately 15 percent, or about 322 of the currently inactive operators, having approximately 1,148 inactive wells, would return to active status as a result of the proposed amendments eliminating individual well bond requirements. This would result in an estimated $666,400 in additional revenue, which would be deposited to the OFCUF. The increased revenue to the OFCUF will be used to cover the cost of plugging additional abandoned wells and for the cleanup of pollution.

During the first year of implementation of the proposed amendments (fiscal year 2004), the Commission will expend money from the increased revenues for relatively minor document revision, process analysis and computer programming to implement the proposed changes to individual well bond requirements. Commission staff estimates that the computer programming will cost approximately $6,200. Any incremental increase in expenditures by the Commission for the first year of implementation will be funded through the OFCUF.

There will be no fiscal implications for local governments.

Pursuant to Texas Government Code, §2006.002, the Commission has determined that the proposed amendments to §3.14 will not have a net adverse economic effect on small businesses or micro- businesses. For small business and micro-business operators, there will be no cost of compliance with the proposed amendments eliminating individual well bond requirements.

The individual well bond requirements of current §3.14 have a disproportionate impact on small business and micro-business operators because large operators tend to be bonded operators not required to file individual well bonds. The proposed amendments will eliminate for small business and micro-business operators the cost of compliance with the individual well bond requirements of current §3.14. Savings in the cost of the annual premium for individual well bonds may be significant for some small business and micro-business operators.

In addition, the Commission has determined that eliminating the individual well bond requirements of §3.14 will make it more practical for some small business and micro-business operators who have been unable to obtain a bond or letter of credit for filing as financial security to file one of the alternate forms of financial security provided by §3.78(d) of this title and Texas Natural Resources Code, §91.104. For some small business and micro-business operators, the ability to file an alternate form of financial security may make the difference in being able to renew their organization reports and continue in business during the interim period prior to September 1, 2004, when more stringent financial security requirements take effect. For others, it may mean savings in costs associated with cash or other collateral required to be posted in order to obtain a performance bond or letter of credit. In either event, the effect on small businesses and micro-businesses should be beneficial rather than adverse.

There will be no cost to small business or micro-business operators of compliance with the proposed amendment to current §3.14(b)(2)(E), re-lettered as §3.14(b)(2)(D), clarifying that the test required by this subparagraph must be a successful fluid level or hydraulic pressure test establishing that a well does not pose a potential threat of harm to natural resources, including surface and subsurface water, oil, and gas. Testing is required by current §3.14(b)(2)(E), and the proposed amendment simply clarifies what the testing must establish. This amendment does not make any change in current Commission policy and practice.

The proposed amendment to clause (v) of current §3.14(b)(2)(E), re-lettered as §3.14(b)(2)(D), potentially will impact only those operators who have sought to avoid the inactive well testing requirements of current §3.14(b)(2)(E) by restoring a well to activity without performing one of the required tests. It is not likely that any significant number of small or micro-business operators will be affected by the change made by this proposed amendment.

In the event a small or micro-business operator were required to meet testing requirements of current §3.14(b)(2)(E) for a particular well that hypothetically might be avoided under current clause (v) of this subparagraph, the operator would incur cost of about $200 for one average fluid level test. Any needed fluid level tests on additional wells performed at the same time and location would incur a cost per well of only about $25. The Commission does not have information as to the number of employees, hours of labor, or sales of small and micro-business operators. However, the per employee cost of conducting one average fluid level test for a small or micro-business operator with one employee would be $200, for an operator with 20 employees $10, and for an operator with 99 employees $2.02. For comparison, the per employee cost for one average fluid level test to a large business operator with 500 employees would be $0.40, or for a large business operator with 1,000 employees $0.20. The potential impact on small or micro-business operators of the proposed amendment to clause (v) of current §3.14(b)(2)(E) will be more than offset by cost savings to such operators resulting from the other proposed amendments which eliminate individual well bond requirements.

James M. Doherty, Hearings Examiner, Oil and Gas Section, Office of General Counsel, has determined that for each year of the first five years that the amended section will be in effect, the public benefit will be that operators who might otherwise be forced out of business by their inability to become bonded operators or to obtain individual well bonds may be able to continue to produce oil and gas to the public's benefit. The public will also benefit from the proposed amendments to current §3.14(b)(2)(E), re-lettered as §3.14(b)(2)(D), which will help ensure that wells that have become inactive do not pose a threat to natural resources, including surface and subsurface water, oil, and gas.

Comments may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas,

P. O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state,tx.us. The Commission will accept comments for 60 days after publication in the *Texas Register*. For further information, call James M. Doherty at (512) 463-7152. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendments to §3.14 pursuant to Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.201, 85.202, 86.041, 86.042, 91.101, 141.011, and 141.012 which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil, gas or geothermal wells and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

Texas Natural Resources Code, §§81.051, 81.052, 85.042, , 85.201, 85.202, 86.041, 86.042, 91.101, 91.103, 91.104, 91.111, 91.112, 91.113, 141.011, and 141.012 are affected by the proposed amendments.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.201, 85.202, 86.041, 86.042, 91.101, 141.011, and 141.012.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81, 85, 86, 91, and 141.

Issued in Austin, Texas on August 5, 2003.

§3.14. Plugging.

(a) Definitions and application to plug.

(1) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(A)-(F) (No change.)

[~~(G) Individual well bond--A bond or letter of credit issued:~~]

[~~(i)~~ ~~on~~ a ~~Commission-approved~~ ~~form;~~]

[~~(ii)~~ ~~by~~ a ~~third party surety,~~ ~~insurance company,~~ ~~or financial institution approved by the Commission;~~ ~~and~~]

[~~(iii)~~ ~~to secure the timely and proper plugging of a specified well and remediation of the wellsite in accordance with Commission rules.~~]

(G) [~~(H)~~] Operator designation form--A certificate of compliance and transportation authority [~~and compliance~~] or an application to drill, deepen, recomplete, plug back, or reenter which has been completed, signed and filed with the Commission.

(H) [~~(I)~~] Productive horizon--Any stratum known to contain oil, gas, or geothermal resources in producible quantities in the vicinity of an unplugged well.

(I) [~~(J)~~] Related piping--The surface piping and subsurface piping that is less than three feet beneath the ground surface between pieces of equipment located at any collection or treatment facility. Such piping would include piping between and among headers, manifolds, separators, storage tanks, gun barrels, heater treaters, dehydrators, and any other equipment located at a collection or treatment facility. The term is not intended to refer to lines, such as flowlines, gathering lines, and injection lines that lead up to and away from any such collection or treatment facility.

(J) [~~(K)~~] Reported production--Production of oil or gas, excluding production attributable to well tests, accurately reported to the Commission on a monthly producer's report.

(K) [~~(L)~~] To serve notice on the surface owner or resident--To hand deliver a written notice identifying the well or wells to be plugged and the projected date the well or wells will be plugged to the surface owner, or resident if the owner is absent, at least three days prior to the day of plugging or to mail the notice by first class mail, postage pre- paid, to the last known address of the surface owner or resident at least seven days prior to the day of plugging.

(L) [~~(M)~~] Unbonded operator--An operator that has a current and active organization report on file with the Commission but that does not have a current individual performance bond, blanket performance bond, letter of credit, or cash deposit as its financial security under §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed) (Statewide Rule 78).

(M) [~~(N)~~] Usable quality water strata--All strata determined by the Texas Commission on Environmental Quality or its successor agencies to contain usable quality water.

(N) [~~(O)~~] Written notice--Notice actually received by the intended recipient in tangible or retrievable form, including notice set out on paper and hand-delivered, facsimile transmissions, and electronic mail transmissions.

(2)-(5) (No change.)

(b) Commencement of plugging operations and extensions.

(1) (No change.)

(2) Plugging operations on each dry or inactive well shall be commenced within a period of one year after drilling or operations cease and shall proceed with due diligence until completed. Plugging operations on delinquent inactive wells shall be commenced immediately unless the well is restored to active operation. For good cause, a reasonable extension of time in which to start the plugging operations may be granted pursuant to the following procedures.

(A) Plugging of inactive wells operated by unbonded operators. The Commission or its delegate may administratively grant an extension of up to one year of the deadline for plugging an inactive well that is operated by an unbonded operator if the following criteria are met: [~~Wells that have been inactive for less than 36 months.~~]

[~~(i)~~ ~~The Commission or its delegate may administratively grant an extension of up to one year of the deadline for plugging a well that is operated by an unbonded operator and has been inactive, without a return to active operation, for a period of less than 36 months if the following criteria are met:~~]

(i) [~~(I)~~] The well and associated facilities are in compliance with all other laws and Commission rules;

(ii) [~~(II)~~] The operator's organization report is current and active;

(iii) [~~(III)~~] The operator has, and upon request provides evidence of, a good faith claim to a continuing right to operate the well;

(iv) [~~(IV)~~] The operator has paid the proper fee as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate [~~Alternative~~] Forms of Financial Security Required To Be Filed) (Statewide Rule 78); and

(v) [~~(V)~~] The operator has tested the well in accordance with the provisions of subparagraph (D) [~~(E)~~] of this paragraph and files with its application proof of either:

(I) [~~(-a-)~~] a fluid level test conducted within 90 days prior to the application for a plugging extension demonstrating that any fluid in the wellbore is at least 250 feet below the base of the deepest usable quality water stratum [~~strata~~]; or,

(II) [~~(-b-)~~] a hydraulic pressure test conducted during the period the well has been inactive and not more than four years prior to the date of application demonstrating the mechanical integrity of the well. [~~; and,~~]

[(VI) ~~The requested plugging extension will not extend beyond the thirty-sixth month of inactivity.~~]

[(ii) ~~A plugging extension granted under this subparagraph may not extend the period of inactivity beyond 36 months.~~]

[~~(B) Wells that have been inactive for 36 months or longer.~~]

[(i) ~~The Commission or its delegate may administratively grant an extension of up to one year of the deadline for plugging a well that is operated by an unbonded operator and has been inactive, without a return to active operation, for a period of 36 months or longer if the criteria set out in subclauses (I)-(IV) of subsection (b)(2)(A)(i) of this section are met, and, in addition:~~]

[(I) ~~The operator has tested the well in accordance with the provisions of subparagraph (E) of this paragraph and files with its application proof of either:~~]

[~~(-a-) a fluid level test conducted within 90 days prior to the application for a plugging extension demonstrating that any fluid in the wellbore is at least 250 feet below the base of the deepest usable quality water strata, or,~~]

[~~(-b-) a hydraulic pressure test conducted during the period the well has been inactive and not more than four years prior to the date of application demonstrating the mechanical integrity of the well; and,~~]

[(II) ~~The operator files an individual well bond in the amount provided for in §3.78(m) of this title (relating to Fees, Performance Bonds, and Alternative Forms of Financial Security Required To Be Filed) (Statewide Rule 78).~~]

[(ii) ~~An operator may rebut the presumed estimated plugging costs for a specific well for which a plugging extension is sought at hearing by clear and convincing evidence establishing a higher or lower prospective plugging cost for the well. The operator, Commission staff, or any owner of the surface or mineral estate on which the well is located may initiate a hearing on the prospective plugging cost for a well for the purpose of setting the amount of an individual well bond by filing a request for hearing.~~]

(B) [~~(C)~~] Plugging of inactive wells operated by bonded operators. An operator that maintains valid, Commission-approved financial security in the form of an individual performance bond, blanket performance bond, letter of credit, or cash deposit as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed) (Statewide Rule 78) will be granted a one-year plugging extension for each well it operates that has been inactive for 12 months or more at the time its annual organizational report is approved by the Commission if the following criteria are met:

(i) The well and associated facilities are in compliance with all laws and Commission rules; and,

(ii) The operator has, and upon request provides evidence of, a good faith claim to a continuing right to operate the well.

(C) [~~(D)~~] Revocation or denial of plugging extension.

(i) The Commission or its delegate may revoke a plugging extension if the operator of the well that is the subject of the extension fails to maintain the well and all associated facilities in compliance with Commission rules; fails to maintain a current and accurate organizational report on file with the Commission; fails to provide the Commission, upon request, with evidence of a continuing good faith claim to operate the well; or fails to obtain or maintain financial security as required by §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required to be Filed) (Statewide Rule 78) [~~a valid individual well bond or organizational bond or letter of credit as required by this subsection~~].

(ii) If the Commission or its delegate declines to grant or continue a plugging extension or revokes a previously granted extension, the operator shall either return the well to active operation or, within 30 days, plug the well or request a hearing on the matter.

(D) [~~(E)~~] The operator of any well more than 25 years old that becomes inactive and subject to the provisions of this paragraph or the operator of any well for which a plugging extension is sought under the terms of subparagraph (A) [~~or (B)~~] of this paragraph shall plug the well or successfully conduct a fluid level or hydraulic pressure test establishing that the well does not pose [~~or test such well to determine whether the well poses~~] a potential threat of harm to natural resources, including surface and subsurface water, oil and gas.

(i) In general, a fluid level test is a sufficient test for purposes of this subparagraph. The operator shall give the district office written notice specifying the date and approximate time it intends to conduct the fluid level test at least 48 hours prior to conducting the test; however, upon a showing of undue hardship, the district director or the director's delegate may grant a written waiver or reduction of the notice requirement for a specific well test. The director or the director's delegate may require alternate methods of testing if necessary to ensure the well does not pose a potential threat of harm to natural resources. Alternate methods of testing may be approved by the director or the director's delegate by written application and upon a showing that such a test will provide information sufficient to determine that the well does not pose a threat to natural resources.

(ii) No test other than a fluid level test shall be acceptable without prior approval from the district director or the director's delegate. The district director or the director's delegate shall be notified at least 48 hours before any test other than a fluid level test is conducted. Mechanical integrity test results shall be filed with the district office and fluid level test results shall be filed with the Commission in Austin. Test results shall be filed on a Commission-approved form, within 30 days of the completion of the test. Upon request, the operator shall file the actual test data for any mechanical integrity or fluid level test that it has conducted.

(iii) Notwithstanding the provisions of clause (ii) of this subparagraph, a hydraulic pressure test may be conducted without prior approval from the district director or the director's delegate, provided that the operator gives the district office written notice specifying the date and approximate time for the test at least 48 hours prior to the time the test will be conducted, the production casing is tested to a depth of at least 250 feet below the base of usable quality water strata, or 100 feet below the top of cement behind the production casing, whichever is deeper, and the minimum test pressure is greater than or equal to 250 psig for a period of at least 30 minutes.

(iv) If the operator performs a hydraulic pressure test in accordance with the provisions of clause (iii) of this subparagraph, the well shall be exempt from further testing for five years from the date of the test, except to the extent compliance with paragraph (2) of subsection (b) of this section requires more frequent testing. Further, the Commission or its delegate may require the operator to perform testing more frequently to ensure that the well does not pose a threat of harm to natural resources. The Commission or its delegate may approve less frequent well tests under this subparagraph upon written request and for good cause shown provided that less frequent testing will not increase the threat of harm to natural resources.

(v) A well subject to the testing requirements of this subparagraph shall not be returned to active operation unless a fluid level test of the well has been performed within 12 months prior to the return to activity or a mechanical integrity test of the well has been performed within 60 months prior to the return to activity [~~Wells that are returned to continuous production, as evidenced by three consecutive months of reported production of at least 10 barrels of oil or 100 mcf of gas per month, need not be tested~~].

(3)-(5) (No change.)

(c)-(k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304877
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-6684

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

The Texas Education Agency (TEA) proposes amendments to §§89.1011, 89.1050, 89.1052, and 89.1185, and the repeal of §89.1110, concerning special education services for students with disabilities. The sections clarify federal regulations and state statutes pertaining to delivering special education services to students with disabilities. The proposed amendments reflect revised and repealed rules resulting from revisions to the Texas Education Code (TEC) and clarification of rulemaking to align with rulings of the Third Court of Appeals-Austin. The proposed rule actions address the legislative requirements through the repeal of 19 TAC §89.1110, Memorandum of Understanding on Individual Transition Planning for Students Receiving Special Education Services, and amendments to 19 TAC §89.1011, Referral for Full and Individual Initial Evaluation; 19 TAC §89.1050, The Admission, Review, and Dismissal (ARD) Committee; and 19 TAC §89.1052, Discretionary Placements in Juvenile Justice Alternative Education Programs (JJAEP). The court ruling is addressed in the proposed amendment to 19 TAC §89.1185, Hearing.

During the 78th Texas Legislative Session, 2003, several new sections of law impacting special education were added and other sections were amended. Additionally, on July 11, 2003, the Third Court of Appeals-Austin ruled in a case impacting current rule related to the timeline for appealing the decision of a due process hearing officer. As a result of the changes to the state law and rulings by the Court, 19 TAC Chapter 89, Subchapter AA, must be amended to incorporate these changes to ensure school district compliance with new procedural requirements.

Specifically, this rule action proposes to amend: (1) 19 TAC §89.1011, Referral for Full and Individual Initial Evaluation, to reflect changes made in TEC, §29.004, related to the 60 calendar-day timeline for completion of a full and individual initial evaluation; (2) 19 TAC §89.1050, The Admission, Review, and Dismissal (ARD) Committee, to reflect requirements of the ARD committee related to personal graduation plans and intensive instruction as referenced in TEC, §28.0212 and §28.0213; (3) 19 TAC §89.1052, Discretionary Placements in Juvenile Justice Alternative Education Programs (JJAEP), to reflect an extension of the rule effective date related to these placements as referenced in TEC, §37.004; and (4) 19 TAC §89.1185, Hearing, to reflect the findings of the Third Court of Appeals-Austin related to the timeline for appealing the decision of a due process hearing officer. This rule action also proposes the repeal of 19 TAC §89.1110, Memorandum of Understanding on Individual Transition Planning for Students Receiving Special Education Services, to reflect the changes made in TEC, §29.011.

The most significant issue pertaining to these proposed actions relates to the repeal of 19 TAC §89.1110 to comply with amendments made to TEC, §29.011. The amended law in TEC, §29.011, no longer requires a memorandum of understanding (MOU) on transition planning for students with disabilities. Therefore, the repeal of the current MOU in 19 TAC §89.1110 is proposed to reflect legislative intent. Additional language related to the new transition requirements reflected in TEC, §29.011, will be reflected in a future rule proposal. Additionally, during the legislative session in 2003, the TEC was amended to revise the calculation of the timeline for completion of full and individual initial evaluations. The timeline no longer will begin at referral of the student for evaluation but, rather, at the point a school district receives written consent signed by the student's parent or legal guardian. Based on changes to TEC, §29.004, the amendment of 19 TAC §89.1011 is proposed to reflect an appropriate change related to the 60 calendar-day timeline for completion of a full and individual initial evaluation.

The proposed rule actions related to 19 TAC Chapter 89, Subchapter AA, incorporate procedural requirements contained in the state law and resulting from court rulings that schools districts must follow. A statewide public hearing will be scheduled for late August or early September 2003. In addition, the public will be given the opportunity to submit written/electronic comments.

Paul Cruz, deputy commissioner for dropout prevention and initiatives, has determined that for the first five- year period the amendments and repeal are in effect there will be fiscal implications for state or local government as a result of enforcing or administering the amendments and repeal. The repeal of the MOU

in §89.1110 and elimination of related activities involving separate individual transition planning meetings and individual transition plans (ITPs) for students with disabilities who are at least 16 years of age will result in an anticipated savings to school districts of approximately $17,567,570 over the next five years. The reduction in costs is estimated as a reduction in staff time directed toward separate transition planning activities beyond what already is required by the Individuals with Disabilities Education Act and related federal regulations.

Dr. Cruz has determined that for each year of the first five years the amendments and repeal are in effect the public benefit anticipated as a result of enforcing the amendments and repeal will be to clarify legislative intent and/or state requirements related to the evaluation of students with disabilities for special education services, provide guidance relating to the responsibilities of the ARD committee, and reflect current court rulings related to the implementation of federal regulations and state law. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments and repeal as proposed.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendments and repeal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS AND STATE LAW

19 TAC §§89.1011, 89.1050, 89.1052

The amendments are proposed under the Texas Education Code (TEC), §29.001, which authorizes the commissioner of education to adopt rules for the administration and funding of the special education services.

The proposed amendments implement 34 Code of Federal Regulations, §300.347, and TEC, §§28.0212, 28.0213, 29.004, and 37.004.

§89.1011. Referral for Full and Individual Initial Evaluation.

Referral of students for a full and individual initial evaluation for possible special education services shall be a part of the district's overall, general education referral or screening system. Prior to referral, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial, remedial, compensatory, and other services. If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation. This referral for a full and individual initial evaluation may be initiated by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student. [~~The referral for a full and individual initial evaluation must be completed in accordance with Texas Education Code, §29.004, related to the 60 calendar day time line.~~]

§89.1050. The Admission, Review, and Dismissal (ARD) Committee.

(a) Each school district shall establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full and individual initial evaluation is conducted pursuant to §89.1011 of this title (relating to Referral for Full and Individual Initial Evaluation). The ARD committee shall be the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.344. The school district shall be responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including, specifically, the following:

(1) 34 CFR, §§300.340-300.349, and Texas Education Code (TEC), §29.005 (Individualized Education Program);

(2) 34 CFR, §§300.400-300.402 (relating to placement of eligible students in private schools by a school district);

(3) 34 CFR, §§300.452, 300.455, and 300.456 (relating to the development and implementation of service plans for eligible students in private school who have been designated to receive special education and related services);

(4) 34 CFR, §§300.520, 300.522, and 300.523, and TEC, §37.004 (Placement of Students with Disabilities);

(5) 34 CFR, §§300.532-300.536 (relating to evaluations, re-evaluations, and determination of eligibility);

(6) 34 CFR, §§300.550-300.553 (relating to least restrictive environment);

(7) TEC, §28.006 (Reading Diagnosis);

(8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);

(9) TEC, §28.0212 (Personal Graduation Plan);

(10) TEC, §28.0213 (Intensive Program of Instruction);

(11) [~~(9)~~] TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);

(12) [~~(10)~~] TEC, §30.002 (Education of Children with Visual Impairments);

(13) [~~(11)~~] TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);

(14) [~~(12)~~] TEC, §33.081 (Extracurricular Activities);

(15) [~~(13)~~] TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and

(16) [~~(14)~~] TEC, §42.151 (Special Education).

(b)-(h) (No change.)

§89.1052. Discretionary Placements in Juvenile Justice Alternative Education Programs (JJAEP).

[~~(a) This section will expire on September 1, 2003.~~]

(a) [~~(b)~~] In a county with a JJAEP, a local school district shall invite the administrator of the JJAEP or the administrator's designee to an admission, review, and dismissal (ARD) committee meeting convened to discuss a student's expulsion under the provisions listed in Texas Education Code (TEC), §37.004(e), relating to offenses for which a school district may expel a student. The reasonable notice of the ARD committee meeting must be provided consistent with 34 CFR, §300.345 and §300.503, and §89.1015 of this title (relating to Time Line for All Notices), and a copy of the student's current individualized education program (IEP) must be provided to

the JJAEP administrator or designee with the notice. If the JJAEP representative is unable to attend the ARD committee meeting, the representative must be given the opportunity to participate in the meeting through alternative means including conference telephone calls. The JJAEP representative may participate in the meeting to the extent that the meeting relates to the student's placement in the JJAEP and implementation of the student's current IEP in the JJAEP.

(b) [~~(c)~~] In accordance with TEC, §37.004(f), when the JJAEP administrator or designee provides written notice of specific concerns to the school district from which a student was expelled under one of the provisions listed in TEC, §37.004(e), relating to offenses for which a school district may expel a student, an ARD committee meeting must be convened to reconsider placement of the student in the JJAEP. The reasonable notice of the ARD committee meeting must be provided consistent with 34 CFR, §300.345 and §300.503, and §89.1015 of this title (relating to Time Line for All Notices). If the JJAEP representative is unable to attend the ARD committee meeting, the representative must be given the opportunity to participate in the meeting through alternative means including conference telephone calls. The JJAEP representative may participate in the meeting to the extent that the meeting relates to the student's continued placement in the JJAEP.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304948
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-9701

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DIVISION 3. MEMORANDA OF UNDERSTANDING AFFECTING SPECIAL EDUCATION STUDENTS

19 TAC §89.1110

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Education Agency or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Education Code (TEC), §29.001 and §29.011, which authorize the commissioner of education to adopt rules for the administration and funding of the special education services and procedures for compliance with federal requirements relating to transition.

The proposed repeal implements TEC, §29.011.

§89.1110. Memorandum of Understanding on Individual Transition Planning for Students Receiving Special Education Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304949
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-9701

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DIVISION 7. RESOLUTION OF DISPUTES BETWEEN PARENTS AND SCHOOL DISTRICTS

19 TAC §89.1185

The amendment is proposed under the Texas Education Code (TEC), §29.001, which authorizes the commissioner of education to adopt rules for the administration and funding of the special education services.

The proposed amendment implements 34 Code of Federal Regulations, §300.507.

§89.1185. Hearing.

(a)-(o) (No change.)

(p) The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 United States Code (USC), §1415(i)(2), and 34 CFR, §300.512. [~~Effective with hearing officer decisions issued on or after August 1, 2002, a civil action brought in a court of competent jurisdiction under 20 USC, §1415(i)(2), and 34 CFR, §300.512, must be initiated no more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing.~~]

(q) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304950
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-9701

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING
SUBCHAPTER C. ADOPTIONS BY REFERENCE

19 TAC §109.41

The Texas Education Agency (TEA) proposes an amendment to §109.41, concerning the "Financial Accountability System Resource Guide." The section adopts by reference the "Financial Accountability System Resource Guide" as the TEA's official rule. The "Resource Guide" describes rules for financial

accounting such as financial reporting, budgeting, purchasing, auditing, site-based decision making, data collection and reporting, management, and state compensatory education. Public school districts use the "Resource Guide" to meet the accounting, auditing, budgeting, and reporting requirements as set forth in the Texas Education Code (TEC) and other state statutes relating to public school finance. Under §109.41(b), the commissioner of education shall amend the "Resource Guide," adopting it by reference, as needed. The "Resource Guide" is available at http://www.tea.state.tx.us/school.finance/ on the TEA website.

The proposed amendment to §109.41 changes the date from "January 2003" to "November 2003" to reflect the effective date of proposed amendments to the "Resource Guide." The proposed amendments to the "Resource Guide" incorporate changes to the state compensatory education module and other changes due to the 78th Texas Legislature 2003; amendment of the charter school financial accounting and reporting standards; and other minor edits.

Thomas D. Canby, Jr., managing director for school financial audits, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Canby has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be improving financial accountability for educational programs in the Texas school system and keeping financial management practices current with changes in state law and federal rules and regulations. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§7.055, 44.001, 44.007, and 44.008, which authorizes the commissioner of education to prescribe the standards for the required agreed-upon procedures of school district leaver records and to establish advisory guidelines relating to fiscal management of a school district and the State Board of Education to establish a standard school fiscal accounting system in conformity with generally accepted accounting principles.

The proposed amendment implements the Texas Education Code, §§7.055, 44.001, 44.007, and 44.008.

§109.41. Financial Accountability System Resource Guide.

(a) The rules for financial accounting are described in the official Texas Education Agency publication, Financial Accountability System Resource Guide, as amended November 2003, [~~January~~ ~~2003,~~] which is adopted by this reference as the agency's official rule. A copy is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(b) The commissioner of education shall amend the Financial Accountability System Resource Guide and this section adopting it by reference, as needed. The commissioner shall inform the State Board of Education of the intent to amend the Resource Guide and of the effect of proposed amendments before submitting them to the Office of the Secretary of State as proposed rule changes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304951
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-9701

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CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1025

The Texas Education Agency (TEA) proposes an amendment to §129.1025, concerning student attendance accounting. The amendment would adopt by reference the *2003-2004 Student Attendance Accounting Handbook* which provides student attendance accounting rules for school districts and charter schools. Texas Education Code (TEC), §42.004, requires the commissioner, in accordance with rules of the State Board of Education (SBOE), to take such action and require such reports as may be necessary to implement and administer the Foundation School Program (FSP). SBOE rule, 19 Texas Administrative Code (TAC) §129.21, delineates responsibilities of the commissioner to provide guidelines for attendance accounting, necessary records and procedures required of school districts in preparation of a daily attendance register, and provisions for special circumstances regarding attendance accounting.

Legal counsel with the TEA has recommended that the procedures contained in each annual student attendance accounting handbook be adopted as part of the *Texas Administrative Code*. This decision was made in 2000 given a court decision challenging state agency decision-making via administrative letter/publications. Given the statewide application of the attendance accounting rules and the existence of sufficient statutory authority for the commissioner of education to adopt by reference the student attendance accounting handbook, staff proceeded with formal adoption of rules in this area. The intention is to annually update the rule to refer to the most recently published student attendance accounting handbook.

Each annual student attendance accounting handbook provides school districts and charter schools with the FSP eligibility requirements of all students, prescribes the minimum requirements of all student attendance accounting systems, lists the documentation requirements for attendance audit purposes, specifies the minimum standards for systems that are entirely functional without the use of paper, and details the responsibilities of all district personnel involved in student attendance accounting. The TEA distributes FSP resources under the

procedures specified in each current student attendance accounting handbook. One copy of the final printed version of the student attendance accounting handbook is mailed to each district and published on the TEA web site each June/July. A supplement, if necessary, is mailed to each district and published on the TEA web site.

The proposed amendment to 19 TAC §129.1025 adopts by reference the student attendance accounting handbook that has been updated for the 2003-2004 school year. Significant changes in the *2003-2004 Student Attendance Accounting Handbook* include information relating to the following: (1) schedule for reconciliation of student membership from the teacher's roster to the attendance accounting records; (2) general eligibility requirements for five and six year olds entering kindergarten or the first grade; (3) average daily attendance (ADA) eligibility coding for children participating in the Pregnancy, Education, and Parenting program; (4) school calendar; (5) general rules for special education students who are in off home campus instructional arrangement/settings; (6) eligibility for Extended School Year (ESY) Services; (7) PEIMS reporting requirement for private school students receiving special education services from an LEA; (8) requirements for school districts contracting with other entities providing career and technology education instruction; (9) career and technology self-paced instruction minimum time requirements chart; (10) career and technology education career preparation eligibility requirements; (11) additional examples regarding Limited English Proficiency status; (12) Prekindergarten enrollment procedure and eligibility; (13) Pregnancy Related Services eligibility and quality control regarding Compensatory Education Home Instruction; (14) expulsion of students with disabilities continuing to be provided a free, appropriate public education; and (15) revised definition of homeless students.

In addition, the proposed amendment adds new language to the rule text to clarify that data from earlier school years continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

Ed Flathouse, associate commissioner for finance and support systems, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Flathouse has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the section will be the continued public knowledge of the existence of annual publications that specify attendance accounting procedures for school districts and charter schools. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under Texas Education Code (TEC), §42.004, 74th Texas Legislature, 1995, which authorizes the commissioner of education, in accordance with rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the Texas Education Code, §42.004, 74th Texas Legislature, 1995.

§129.1025. Adoption By Reference: Student Attendance Accounting Handbook.

(a) The standard procedures that school districts and charter schools shall use to maintain records and make reports on student attendance and student participation in special programs for school year 2003- 2004 [~~2002-2003~~] are described in the official Texas Education Agency (TEA) publication, *2003-2004* [~~2002-2003~~] *Student Attendance Accounting Handbook*, which is adopted by this reference as the agency's official rule. A copy of the *2003-2004* [~~2002- 2003~~] *Student Attendance Accounting Handbook* is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. In addition, the publication can be accessed from the TEA official website.

(b) The commissioner of education shall amend the *2003-2004* [~~2002-2003~~] *Student Attendance Accounting Handbook* and this section adopting it by reference, as needed.

(c) Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304952
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 25. STRUCTURAL PEST CONTROL BOARD

CHAPTER 593. LICENSES

22 TAC §593.3

The Structural Pest Control Board proposes amendments of 22 TAC §593.3 concerning insurance requirements. The proposal adds requirements that wood treaters carry the same liability insurance coverage carried by all pest control businesses throughout the State of Texas. Their licensure is contingent upon their meeting the liability insurance requirements.

Dale Burnett, Executive Director has determined that there will not be fiscal implications as a result of enforcing or administering the rule.

There will be no estimated additional cost, estimated reduction in cost or estimated loss or increase in revenue to state or local government for the first five year period the rule will be in effect. There will be no cost of compliance for small businesses. There will be no cost comparison for cost per employee, cost per hour of labor or cost per $100 of sales for small or large businesses.

Dale Burnett, Executive Director has determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule as proposed will be the wood treating industry will be able to continue to operate despite their being unable to obtain insurance coverage from other sectors of the insurance industry.

There will be no anticipated economic cost to individuals who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Frank M. Crull, General Counsel, Structural Pest Control Board, P.O. Box 1927, Austin, Texas 78767-1927. Telephone No. 512-305-8270.

The amendment is proposed under the Structural Pest Control Act, Chapter 1951 of the Occupations Code which provides the Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

There is no other statute, article or code affected by this proposed amendment.

§593.3. Insurance Requirement.

(a) Each business license applicant and certified noncommercial applicator license applicant must submit with the application an insurance policy or certificate of coverage in the amount of not less than $200,000 for bodily injury and property damage coverage with a minimum total annual aggregate of $300,000 for all occurrences insuring applicant against liability for damage to persons or property occurring as a result of operations performed in the course of the business of structural pest control to premises or any other property under applicant's care, custody, or control. No new business license or certified noncommercial applicator license will be issued until insurance requirements are met. Policies shall contain a cancellation provision whereby notification of cancellation is received by the Board not less than thirty (30) days prior to cancellation. Certified noncommercial applicators employed by governmental entities are exempt from this provision. Certified applicators who are not actively engaged in the business of structural pest control and do not perform structural pest control work as a part of the duties of their employment are exempt from this provision.

(b) If payment of claims results in reducing the total aggregate of coverage below $300,000, the insurance carrier shall notify the Board and the licensee within thirty (30) days. The licensee shall obtain additional coverage to meet the minimum requirements.

(c) The Board will consider as sufficient only those policies issued by insurers authorized by or registered with the State Board of Insurance. A licensee who operates as a wood treater who treats wood on a commercial property owned by the licensee must submit with their application a general liability insurance policy or certificate of coverage in the amount of not less than $200,000 for bodily injury and property damage coverage with a minimum total annual aggregate of $300,000 for all occurrences. No license will be issued until this insurance requirement is met. Policies shall contain a cancellation provision whereby the Board receives notification of cancellation not less than thirty (30) days prior to cancellation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304810
Dale Burnett
Executive Director
Structural Pest Control Board
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 305-8270

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 665. EXAMINATION ADVISORY COMMITTEES

22 TAC §§665.1 - 665.9

The Texas Board of Professional Land Surveying (TBPLS) proposes new §§665.1 - 665.9, concerning Examination Advisory Committees. The new sections establish the requirements and operating procedures for the committees. Legislation enacted in the 78th Legislative Session established these committees.

The proposed new sections add language to address the size, qualifications, appointment procedures, terms of office and training of the committee members and operating procedures for the committees.

Sandy Smith, Executive Director, has determined that at this time there will be no fiscal impact to the state or local governments as a result of enforcing or administering the new sections.

Ms. Smith also has determined that for each year of the first five years the rule is in effect the public will benefit from the rule by prescribing that the Board follow the requirements set forth by the Sunset Commission's review. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752. Comments may also be faxed to Ms. Smith at the Board at (512) 452-7711 or may be sent electronically to sandy.smith@mail.capnet.state.tx.us. All requests for a public hearing on the proposed sections submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposed new sections have been published in the *Texas Register*.

The new sections are proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties. In addition, §1071.551, Title 6, Occupations Code, Subtitle C establishes examination advisory committees and authorizes the Board to adopt necessary rules.

The proposed new sections implement the Texas Administrative Code, Title 22, Part 29, General Rules of Procedures and Practices.

§665.1. Introduction.

(a) The Board shall establish examination advisory committees for the purpose of developing and scoring examinations. Committees will be established to write exam questions, review selected exams for accuracy and resolution time and determine examination scores.

Advisory committees will be responsible for developing and scoring examinations that will ensure a registrant's ability to protect the public safety, welfare and property. The goal of the committees will be to insure that only competent candidates pass the examination.

(b) The committees are established under the Professional Land Surveying Practices Act, §1071.552 which allows the Board to establish advisory committees. Except as provided by §1071.555 the committees are subject to Government Code, Chapter 2110, concerning state agency advisory committees. The committee shall carry out any other tasks given to the committees by the board.

§665.2. Size, Quorum and Qualifications.

(a) Each committee shall be composed of an odd number of not less than 9 members from as varied geographic and practice areas as possible, committees will contain a minimum of:

(1) three members who have been registered less than seven years

(2) three members who have been registered between 7 and 15 years

(3) three members who have been registered more than 15 years

(b) A majority of the membership of each committee constitutes a quorum.

(c) Existing members shall continue to serve until the board appoints members under the new composition.

(d) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, is absent from at least three consecutive committee meetings or is found to have practiced in violation of the Professional Land Surveying Practices Act and/or Rules of the Board or fails to develop a minimum of one analytical or six legal questions each year. The committee chair will notify the board of such vacancies.

(e) Committee members must be currently registered and familiar with requirements for and capabilities of candidates who are minimally qualified to practice.

§665.3. Process of Appointment.

The Board will appoint advisory committee members pursuant to the qualifications listed in this section. All appointments made under this section shall be made without regard to race, creed, sex, religion or national origin. A member of the committee may be appointed to succeed him or herself, except that no member shall be eligible to serve more than two consecutive terms.

§665.4. Terms of Office.

(a) The term of office of each member shall be six years. Members shall serve after expiration of their terms until a replacement is appointed.

(b) Members shall be appointed for staggered terms so that the terms of an equivalent number of members will expire on August 31st of each even-numbered year.

(c) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(d) The chair of the board shall appoint a chair and vice chair of each committee. Each officer may holdover until his or her replacement is appointed by the chair of the board.

(e) The advisory committee chair shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(f) The advisory committee vice chair shall perform the duties of the chair in case of the absence or disability of the presiding officer. In case the office of chair becomes vacant, the vice chair will serve until a successor is appointed to complete the unexpired portion of the term.

(g) The Board shall appoint those currently serving as chair and vice chair on each committee to continue to serve until the board appoints their successors.

(h) Each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551. Meetings regarding test items will be closed.

(i) Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned. A member shall notify the presiding officer or appropriate board staff if he or she is unable to attend a scheduled meeting.

(j) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(k) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(l) Staff support for the committee shall be provided by the board.

(m) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(n) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(o) Each member shall have one vote.

(p) Minutes of each committee meeting shall be taken by a committee member or board staff.

(q) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.

(r) After approval by the committee, the minutes shall be signed by the presiding officer for each committee.

(s) The committee may establish subcommittees as necessary to assist the committee in carrying out its duties. The chair shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairs. Subcommittees shall meet when called by the subcommittee chair or when so directed by the committee.

§665.5. Non-binding statements.

The board and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board or committee.

§665.6. Reimbursement for expenses.

In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the

member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) A committee member who is an employee of a state agency may not receive reimbursement for expenses from the board.

(2) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(3) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by board staff.

§665.7. Training.

A person who is appointed to an advisory committee may not vote, deliberate, or be counted as a member until the person has received and reviewed the following:

(1) The Professional Land Surveying Practices Act and Rules of the Board

(2) The Open Meetings Law, Chapter 551 Government Code

(3) The Public Information Law, Chapter 552 Government Code

§665.8. Examination Process and Board's Interaction.

The board will select examinations using blueprints developed and approved by the board.

(1) Committees will be appointed to

(A) write examination questions based on content areas defined in the blueprint,

(B) review examinations before administration for accuracy and resolution time,

(C) determine cut off scores; and

(D) for any other purposes determined necessary by the board.

(2) Members of the Board may serve as liaison members to each committee.

§665.9. Continuing Education Credit.

Examination committee members are eligible to receive continuing education credit for time served in the commission of their duties and documented on forms signed by the chair of the committee and executive director of the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304885
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 452-9427

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH
SUBCHAPTER T. FAILURE TO PAY CHILD SUPPORT

25 TAC §1.301

The Texas Department of Health (department) proposes an amendment to §1.301, concerning the suspension of license for failure to pay child support.

This amendment is proposed to meet the requirements of Family Code, §232.011, which indicates licensing issuing agencies, when provided with a final order from the Office of Attorney General or a court, shall suspend the license of anyone failing to pay child support.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §1.301 and has determined that reasons for adopting the section continue to exist because rules on this subject are needed.

The department published a Notice of Intention to Review for §1.301 in the *Texas Register* on September 4, 1998 (23 TexReg 9075). No comments were received due to publication of this notice.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Steeg has determined that for each year of the first five years the amendment of §1.301 is in effect, the public benefit anticipated as a result of enforcing the section will be to provide a means by which the public can better understand the methods used by the department to suspend licenses for failure to pay child support. There will be no cost effects on micro-businesses or small businesses. This was determined by interpretation of the rules that micro-businesses or small businesses will not be required to alter their business practices as a result of the proposed amendment of this rule. There are no economic costs to persons who may be affected by the proposed amendment of this rule. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Robin Carter, Legal Assistant, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7236 or by E-mail at the following address: robin.carter@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner.

The amendment affects Health and Safety Code, Chapter 12. The review of the section implements Government Code, §2001.039.

§1.301. Suspension of License for Failure to [~~To~~] Pay Child Support.

(a)-(h) (No change.)

(i) The department is exempt from liability to a license holder for any act authorized and performed under the Family Code, Chapter 232, and this section [~~performed by the department~~].

(j)-(l) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304854
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

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CHAPTER 3. MEMORANDUMS OF UNDERSTANDING WITH OTHER STATE AGENCIES

25 TAC §3.41

The Texas Department of Health (department) proposes new §3.41, concerning the adoption by reference of the memorandum of understanding (MOU) regarding interagency coordination of special education services to students with disabilities in residential facilities.

Texas Education Code, §29.012, requires that the Texas Education Agency (TEA), the Texas Department of Mental Health and Mental Retardation, the Texas Department of Human Services, the Texas Department of Health, the Department of Protective and Regulatory Services, the Interagency Council on Early Childhood Intervention, the Texas Commission on Alcohol and Drug Abuse, the Texas Juvenile Probation Commission, and the Texas Youth Commission by a cooperative effort to develop and, by rule, adopt a memorandum of understanding to establish the respective responsibilities of the agencies for the provision of a free appropriate public education for children with disabilities who reside in facilities operated or regulated by the agencies. The MOU is contained in a rule adopted by the TEA at 19 Texas Administrative Code, §89.1115, effective August 6, 2002.

The MOU establishes the respective responsibilities of school districts and of residential facilities for the provision of a free appropriate public education, as required by the Individuals with Disabilities Education Act, and addresses the respective roles and responsibilities of participating agencies in the sharing of information about, and coordination of services to, students with disabilities receiving special education services who live in residential facilities. The MOU may be considered for expansion, modification, or amendment upon mutual agreement of the executive officers of the participating agencies. In the event that federal and/or state laws are amended, federally interpreted, or judicially interpreted so as to render continued implementation of the MOU unreasonable or impossible, the participating agencies may agree to amend or terminate the MOU.

Nance Stearman, Health Facility Licensing and Compliance Division, has determined that, based upon the fiscal note provided by TEA in proposed rules published in the January 18, 2002, issue of the *Texas Register* (27 TexReg 445), for the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Stearman has also determined that for each of the first five years the section is in effect, the public benefit anticipated by TEA as a result of enforcing or administering the section will be that the interruption of education services to students with disabilities living in residential facilities is minimized through interagency efforts to share relevant student information and coordinate the delivery of services. There will be no effect on small or micro-businesses, or large businesses to comply with the section as proposed based upon the previously referenced TEA proposed rules. There is no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Cindy Bednar, Director of Hospital Program, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6648. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The new section is proposed under Texas Education Code, §29.012, which authorizes the Texas Education Agency, the Texas Department of Mental Health and Mental Retardation, the Texas Department of Human Services, the Texas Department of Health, the Department of Protective and Regulatory Services, the Interagency Council on Early Childhood Intervention, the Texas Commission on Alcohol and Drug Abuse, the Texas Juvenile Probation Commission, and the Texas Youth Commission by a cooperative effort to develop and by rule adopt a memorandum of understanding; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the Commissioner of Health.

The new section affects Health and Safety Code, Chapter 12; and Texas Education Code, §29.012.

§3.41. Memorandum of Understanding Concerning Special Education Services to Students with Disabilities in Residential Facilities.

(a) The Texas Department of Health (department) adopts by reference a memorandum of understanding (MOU) between the Texas Education Agency, Texas Department of Mental Health and Mental Retardation, Texas Department of Health, Texas Department of Protective and Regulatory Services, Texas Commission on Alcohol and Drug Abuse, Texas Juvenile Probation Commission, Texas Youth Commission, Interagency Council on Early Childhood Intervention, and the Texas Department of Human Services. The MOU contains the agreement required by Texas Education Code, Chapter 29, §29.012, to establish the respective responsibilities of these agencies for the provision of a free appropriate public education for children with disabilities who reside in facilities operated or regulated by the agencies.

(b) The MOU is adopted by rule in 19 Texas Administrative Code, §89.1115.

(c) The effective date of the MOU, with respect to the department, is the same as the effective date of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304855
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

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25 TAC §3.51

The Texas Department of Health (department) proposes new §3.51, concerning the adoption by reference of the memorandum of understanding (MOU) related to individual transition planning for students receiving special education services.

Texas Education Code, §29.011, requires that the Texas Education Agency (TEA), the Texas Department of Mental Health and Mental Retardation (TDMHMR), and the Texas Rehabilitation Commission (TRC), by a cooperative effort, develop and, by rule, adopt a MOU that establishes the respective responsibilities of each agency for the provision of services necessary to prepare students enrolled in special education programs for a successful transition to life outside of the public school system. The statute also authorizes the TEA, TDMHMR, and TRC to request other appropriate agencies to participate in the development of the MOU, and, if requested, requires the agencies to participate and adopt the memorandum. The MOU to be adopted by reference is between the Texas Education Agency, Texas Department of Mental Health and Mental Retardation, Texas Rehabilitation Commission, Texas Department of Health, Texas Commission for the Blind, Texas Commission for the Deaf and Hard of Hearing, Texas Department of Housing and Community Affairs, Texas Department of Human Services, Texas Department of Protective and Regulatory Services, Texas Higher Education Coordinating Board, Texas Juvenile Probation Commission, Texas Youth Commission, and the Texas Workforce Commission. The MOU is contained in a rule adopted by the TEA at 19 Texas Administrative Code, §89.1110, effective January 1, 2003.

The MOU addresses respective roles and responsibilities of participating agencies in the sharing of information about, and coordination of services to, eligible students with disabilities receiving transition services. The MOU provides definitions, addresses information sharing and agency participation, contains provisions relating to regional and local collaboration, cross-agency training, and dispute resolution, and provides for the MOU to be reviewed and considered for expansion, modification, or amendment at any time the executive officers for the parties agree, or at least every four years.

Nance Stearman, Health Facility Licensing and Compliance Division, has determined that, based upon the fiscal note provided by TEA in proposed rules published in the June 28, 2002, issue of the *Texas Register* (27 TexReg 5666), for the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Stearman has also determined that for each of the first five years the section is in effect, the public benefit anticipated by TEA as a result of enforcing or administering the section will be that successful transition of students with disabilities to post-secondary adult life endeavors are facilitated when all appropriate agencies, which may be responsible for providing and/or paying for transition services, coordinate efforts. TEA further stated that it is critical that delivery of transition services is a coordinated set of activities, focused on identified individual outcomes, that includes all appropriate adult service agencies and stakeholders. Better coordinated transition service delivery systems result in increased opportunities for students to achieve their post-secondary goals for adult life benefiting the individual, his or her family, and the community. Additionally, better coordinated services are more cost effective for the state by reducing costly duplicative efforts by multiple agencies. There will be no effect on small or micro-businesses, or large businesses to comply with the section as proposed based upon the previously referenced TEA proposed rules. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Cindy Bednar, Director of Hospital Program, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6648. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The new section is proposed under Texas Education Code, §29.011, which authorizes the TEA, TDMHMR, and the TRC, and other agencies they request to participate, to develop and, by rule, adopt a memorandum of understanding; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the Commissioner of Health.

The new section affects Health and Safety Code, Chapter 12; and Texas Education Code, §29.011.

§3.51. Memorandum of Understanding Concerning Individual Transition Planning for Students Receiving Special Education Services.

(a) The Texas Department of Health (department) adopts by reference a memorandum of understanding (MOU) between the Texas Education Agency, the Texas Department of Mental Health and Mental Retardation, Texas Rehabilitation Commission, Texas Department of Health, Texas Commission for the Blind, Texas Commission for the Deaf and Hard of Hearing, Texas Department of Housing and Community Affairs, Texas Department of Human Services, Texas Department of Protective and Regulatory Services, Texas Higher Education Coordinating Board, Texas Juvenile Probation Commission, Texas Youth Commission, and the Texas Workforce Commission. The MOU contains the agreement required by Texas Education Code, Chapter 29, §29.011, to establish the respective responsibilities of these agencies for the provision of the services necessary to prepare students receiving special education services for a successful transition to life outside the public school system.

(b) The MOU is adopted by rule in 19 Texas Administrative Code, §89.1110.

(c) The effective date of the MOU, with respect to the department, is the same as the effective date of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200304853

Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

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CHAPTER 5. GRANTS AND CONTRACTS

The Texas Department of Health (department) proposes the repeal of §§5.51-5.59 and new §§5.51-5.52, concerning the operations and funding for Poison Control Centers and the Poison Control Coordinating Committee (committee).

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 5.51-5.59 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on this subject are needed; however the need to reorganize and modify the existing sections warrants the repeal and proposed new sections.

Additionally, Government Code, Chapter 2110, requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1999, the Texas Board of Health (board) established a rule relating to the Poison Control Coordinating Committee. Section 5.51 states that the committee will automatically be abolished on November 1, 2003, and the department has determined that the committee should be abolished on that date. Issues relating to the type of advice previously provided by the committee are better addressed through the establishment of ad hoc workgroups.

The department published a Notice of Intention to Review for §§5.51-5.59, as required by Government Code, §2001.039, in the February 12, 1999, issue of the *Texas Register* (24 TexReg 1001). In addition, a public hearing was held on May 13, 2002, to accept stakeholder input.

The existing sections were edited and restructured to delete repetitive, ambiguous, obsolete, unenforceable, and unnecessary language. The new sections improve draftsmanship and make the rules more accessible, understandable, and usable. Much of the proposed language is former language; however, the sections were reorganized in a more logical manner resulting in the language appearing as new in the proposed sections.

New §5.51 gives general program information and new §5.52 outlines the criteria for funding.

Ernest (Skip) Oertli, Chief, Bureau of Epidemiology, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implication to state or local government as a result of enforcing or administering the sections as proposed.

Dr. Oertli has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated from the new rules will be increased clarity and ease of understanding the rules. There will be no costs to micro-businesses or small businesses to comply with the sections since the proposal will not require these entities to alter their business practice. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Judy Whitfield, Program Administrator, Poison Control Program, Bureau of Epidemiology, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3183 (512) 458-7268. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

SUBCHAPTER B. POISON CONTROL CENTERS

25 TAC §§5.51 - 5.59

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Health and Safety Code, §11.016, which allows the board to establish advisory committees; Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; Texas Health and Safety Code, §77.009, which requires the board with the authority to establish a program to award grants to fund a network of regional poison control centers; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 5, 11, and 12.

§5.51. General Program Information.
§5.52. Eligible Recipients.
§5.53. State Network Operations Plan.
§5.54. Poison Control Answering Point (PCAP) Operations Plan.
§5.55. Procedures for Requests for Funding.
§5.56. Criteria for Funding.
§5.57. Contracts.
§5.58. Applied Research Grant Program.
§5.59. Poison Control Region.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 5. POISON CONTROL CENTERS

25 TAC §5.51, §5.52

The new sections are proposed under the Texas Health and Safety Code, §11.016, which allows the board to establish

advisory committees; Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; Texas Health and Safety Code, §77.009, which requires the board with the authority to establish a program to award grants to fund a network of regional poison control centers; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

The new sections affect the Health and Safety Code, Chapters 5, 11, and 12.

§5.51. General Program Information.

(a) Authority. Health and Safety Code, Chapter 777, provides the Texas Department of Health (department) and the Commission on State Emergency Communications (commission) with the authority to establish a program to award grants to fund a network of regional poison control centers.

(b) The commission and the department shall adopt a statewide telecommunications network plan. The plan may establish phased implementation of the network. The plan shall consider the following:

(1) uniform statewide 800-service availability for community and professional access for poison information and referral;

(2) direct access from Public Safety Answering Points to Poison Control Answering Points for emergency calls; and

(3) other features as appropriate and identified by this section.

(c) The Texas Health and Human Services (HHS) regions shall define the service areas for the Poison Control Answering Points, except where telecommunications network design would greatly increase the cost of routing the system. The regions are as follows:

(1) The University of Texas Medical Branch at Galveston - HHS Regions 5 and 6;

(2) The Dallas County Hospital District/North Texas Poison Center - HHS Regions 3 and 4;

(3) The University of Texas Health Science Center at San Antonio - HHS Regions 8 and 11;

(4) R.E. Thomason General Hospital, El Paso County Hospital District - HHS Regions 9 and 10;

(5) Northwest Texas Hospital, Amarillo Hospital District - HHS Regions 1 and 2; and

(6) Scott and White Memorial Hospital, Temple - HHS Region 7.

§5.52. Funding.

(a) Eligibility for funding.

(1) The entities eligible to request funding are the regional poison control centers for the state, designated under the Health and Safety Code, Chapter 777, as follows:

(A) University of Texas Medical Branch at Galveston;

(B) Dallas County Hospital District/North Texas Poison Center;

(C) University of Texas Health Science Center at San Antonio;

(D) R.E. Thomason General Hospital, El Paso County Hospital District;

(E) Northwest Texas Hospital, Amarillo Hospital District; and

(F) Scott and White Memorial Hospital, Temple.

(2) Each poison control center must be certified by the American Association of Poison Control Centers (AAPCC) until a statewide system certification is achieved. The Commission on State Emergency Communications and the Texas Department of Health shall work together with the AAPCC to certify the statewide poison control network and/or individual centers as required.

(b) Funding criteria. Applicants must meet all of the goals and objectives outlined in the annual Request for Proposals, including:

(1) the need of the region based on population served for poison control services, and the extent to which the grant would meet the identified need;

(2) a four-year strategic plan assuring provision of quality service;

(3) demonstration that the Poison Control Answering Point is working toward achieving and/or maintaining certification as a poison control center with the AAPCC; and

(4) the availability of other funding sources; the maintenance of effort; and the development or existence of telecommunications systems.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 39. PRIMARY HEALTH CARE SERVICES PROGRAM
SUBCHAPTER D. CLEARINGHOUSE FOR PRIMARY CARE PROVIDERS SEEKING COLLABORATIVE PRACTICE

The Texas Department of Health (department) proposes the repeal of §§39.91-39.94 and new §§39.91-39.94, concerning the department's clearinghouse for primary care providers seeking collaborative practice.

Government Code, §2001.039, requires that each agency review and consider for readoption each rule adopted by the agency under Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed and has determined that the reasons for adopting §§39.91-39.94 continue to exist. Health and Safety Code, §105.007, requires the Statewide Health Care Coordinating Council (the council) to develop and establish a clearinghouse for health professionals seeking collaborative practice. The department assists the council in performing the council's duties and functions as authorized by Health and Safety Code, §104.014, under these rules. The department has determined that the rules would

be more useful to interested individuals if the language was simplified and updated; however, the existing sections are proposed for repeal and the new sections are proposed without substantive changes.

The department published a Notice of Intent to Review for §§39.91-39.94 in the *Texas Register* (25 TexReg 3800), on April 28, 2000. No comments were received due to publication of the notice.

Bruce A. Gunn, Ph.D., Director, Health Professions Resources Center, has determined that for the each year of the first years the sections are in effect, there will be no fiscal impact on state or local governments as a result of administering the sections.

Dr. Gunn has determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the increased ability for health professionals seeking collaborative practice to locate positions available, or communities, professionals and entities seeking health professionals to locate and place qualified individuals. The purpose of the clearinghouse remains the same. There will be no effect on small businesses or micro-businesses as a result of the new sections because no substantive changes are being made. Only persons seeking to register with the clearinghouse are required to comply with the sections. There are no economic costs to persons who are required to comply with the sections as proposed. There will be no effect on local employment.

Comments on the proposal may be submitted to Bruce A. Gunn, Ph.D., Director, Health Professions Resource Center, Center for Health Statistics, or Joan Carol Bates, Assistant General Counsel, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3180, or electronically to bruce.gunn@tdh.state.tx.us, or joan.bates@tdh.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §§39.91 - 39.94

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Health and Safety Code, §105.007, which requires the council to establish the clearinghouse. The department assists the council in performing the council's duties and functions as authorized by Health and Safety Code, §104.014, under these rules. Health and Safety Code, §12.001, provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner. The review of these rules implements Government Code, §2001.039.

The repeals affect Health and Safety Code, Chapters 12, 104, and 105.

§39.91. Purpose and Scope.

§39.92. Definitions.

§39.93. Scope of Clearinghouse Activities.

§39.94. Establishment of a Registry of Primary Care Providers Seeking Collaborative Practice Opportunities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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25 TAC §§39.91 - 39.94

The new sections are proposed under the Health and Safety Code, §105.007, which requires the council to establish the clearinghouse. The department assists the council in performing the council's duties and functions as authorized by Health and Safety Code, §104.014, under these rules. Health and Safety Code, §12.001, provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner. The review of these rules implements Government Code, §2001.039.

The new sections affect Health and Safety Code, Chapters 12, 104, and 105.

§39.91. Purpose and Authority.

(a) Purpose. These sections provide the criteria and procedures the department uses to determine the health professionals to include in the Health Professions Resource Center's primary care provider clearinghouse.

(b) Authority. These sections are authorized by Health and Safety Code, §105.007, which requires the council to develop and establish a clearinghouse for health professionals seeking collaborative practice. The department assists the council in performing the council's duties and functions as authorized by Health and Safety Code, §104.014, under these rules.

§39.92. Definitions.

Terms used in this section have the following meanings, unless the context clearly indicates otherwise. Terms not defined have their common meanings.

(1) Board - The Texas Board of Health.

(2) Clearinghouse - The Internet accessible registry maintained by the Health Professions Resource Center listing primary care providers seeking opportunities to serve on a primary care team in settings such as rural health clinics, federally qualified health centers, or private group practices.

(3) Council - The Statewide Health Coordinating Council

(4) Department - The Texas Department of Health.

(5) Federally qualified health centers - Has the meaning given the term in 42 U.S.C. §1395x(aa)(4).

(6) Health Professions Resource Center - The center established by Health and Safety Code, Chapter 105, for the collection and analysis of educational and employment trends for health professions in the state.

(7) Primary care provider - Primary care providers include the following:

(A) a physician with an unrestricted, active license issued by the Texas State Board of Medical Examiners who practices or plans to practice in the following specialty areas:

(i) family/general practice;

(ii) general pediatrics;

(iii) general internal medicine; or

(iv) obstetrics/gynecology;

(B) an advanced practice nurse with an unrestricted, active license as a registered nurse in Texas or a state party to the Interstate Nurse Licensure Compact, authorization to practice as an advanced practice nurse by the Board of Nurse Examiners for the State of Texas, and who practices or plans to practice in any of the following specialty areas:

(i) adult health;

(ii) family health;

(iii) geriatrics;

(iv) nurse-midwifery;

(v) pediatrics;

(vi) school health; or

(vii) women's health;

(C) a physician assistant with an unrestricted, active license issued by the Texas State Board of Physician Assistant Examiners who practices or plans to practice in one of the following specialty areas:

(i) family/general medicine;

(ii) general pediatrics;

(iii) general internal medicine; or

(iv) obstetrics/gynecology.

(8) Rural health clinics - Has the meaning given the term in 42 U.S.C. §1395x(aa)(2).

§39.93. Provider Registration.

A primary care provider may register with the clearinghouse by completing and submitting a paper form to the clearinghouse, or by accessing and completing the electronic Candidate Interview Forms available online using the department's Internet site at http://www.tdh.state.tx.us/dpa/clrhouse.htm or http://www.texaspracticesites.org/.

§39.94. Duties of the Department.

(a) The department will develop, maintain, and encourage the use of the clearinghouse as an effective and efficient tool for primary care providers to establish collaborative practice opportunities.

(b) The department will collect name, mailing address, phone number, electronic mail address, primary specialty information, preferred practice setting, preferred practice location, and other information relevant to establishing and effective clearinghouse for primary care providers.

(c) The department will give a provider either written or electronic notice of the status of the provider's registration. Only registrations with all required fields completed and accepted will be included in the registry.

(d) A provider whose registration is not approved for inclusion in the registry for any reason other than for incomplete information may request informal reconsideration of the determination by submitting a written request to Manager, Health Professions Resource Center, Center for Health Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Written requests for reconsideration must be made within 10 days from the date the department sent an electronic notice or within 10 working days of the postmarked date of the department's written notice. Denials based on failure to meet the licensing requirements of the appropriate licensing authority are not appealable to the department.

(e) A provider will be included in the clearinghouse registry for four months, unless the provider requests to be deleted. A provider must reapply every four months to remain in the registry. The department will provide electronic or written notices to registrants whose names will be deleted if the provider does not re-register.

(f) The department will update the registry only during the first week of each month. Information received during the second through fourth weeks of the month regarding additions, changes, or deletions to the registry will be processed during the first week of the following month.

(g) The department will notify providers and registrants when the opportunity for a successful collaboration occurs, and work with each party to follow through on opportunities.

(h) There are no fees for using the services provided by the clearinghouse.

(i) Information provided to the department for inclusion in the clearinghouse is subject to Government Code, §552.001, et seq.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

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Susan K. Steeg
General Counsel
Texas Department of Health
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CHAPTER 61. CHRONIC DISEASES
SUBCHAPTER D. OSTEOPOROSIS ADVISORY COMMITTEE

25 TAC §61.61

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Health (department) proposes the repeal of §61.61, concerning the Osteoporosis Advisory Committee (committee). The committee has provided advice to the Texas Board of Health (board) and the department on strategies for educating the public on the health benefits of the early detection, prevention, and treatment of osteoporosis.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, and describe the manner in which the committee will report to the agency.

Funding for the Osteoporosis Prevention Education Program was eliminated for the FY 2004-2005 Biennium. Therefore, the need for this committee and section no longer exists.

Jacquelyn McDonald, Director, Office of the Board of Health, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering this section.

Ms. McDonald has also determined that for each year of the first five years the section is in effect, the public benefit anticipated will be increased flexibility and breadth in obtaining specific input on issues related to osteoporosis. There will be no effect on micro-businesses or small businesses. The proposed rule will not require small businesses and micro-businesses to alter their business practices. There is no economic costs to persons as a result of the elimination of all references to the committee. There will be no effect on local employment.

Comments may be submitted to Jacquelyn McDonald, Director, Office of the Board of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7484. Comments on the proposed section will be accepted for 30 days following publication in the *Texas Register*.

The repeal is proposed under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; Health and Safety Code, §90.03, which allows the department to establish a task force on osteoporosis; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

The proposed repeal affects the Health and Safety Code, Chapters 11 and 90; and the Government Code, Chapter 2110.

§61.61. The Osteoporosis Advisory Committee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304848
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 73. LABORATORIES

The Texas Department of Health (department) proposes the repeal of §73.22 and amendments to §§73.51, 73.54 and 73.55, concerning fees for laboratory services.

The proposed rules include editorial changes to the existing rules; increases to the maximum cap on existing fees and new fees for clinical and environmental testing; and other laboratory services, such as calibration of thermometers. The repeal of §73.22, which is the fee schedule for certification and accreditation of environmental laboratories, is necessary because the Texas Commission for Environmental Quality now administers this program. Section 73.51 contains editorial changes to correct misspelled chemical names and to expand some of the definitions. Sections 73.54 and 73.55 contain the fee schedules for clinical, newborn screening, environmental testing, and other laboratory services. These sections include proposed new fees and increased maximum caps on existing fees.

Dr. Susan Neill, Chief, Bureau of Laboratories, has determined that for each year of the first five-year period the sections are in effect, there will be fiscal implications as a result of administering the sections as proposed. The estimated increase in revenues to the state for each of the first five years the sections are in effect are $200,000 for FY 2004, $250,000 for FY 2005, $300,000 for FY 2006, $350,000 for FY 2007 and $400,000 for FY 2008. These revenues will offset a portion of the costs of performing the laboratory tests. Potentially, there will be increased costs to manage billing and accounts receivable in the Bureau of Laboratories (bureau). It is estimated that the costs to the department to administer the new provisions will be offset by the estimated revenue increases. There will be no effect on existing contracts with other state agencies. Increased costs to local governments cannot be determined at this time.

Dr. Neill has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the availability of tests previously unavailable to local health departments, state agencies and contractors on a fee for service basis. There will be no cost to micro-businesses, small businesses or persons (other than to those that submit specimens for testing) to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be directed to Mrs. Sherry S. Clay, Director, Quality and Regulatory Affairs Division, Bureau of Laboratories, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

25 TAC §73.22

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; §§12.031 and 12.032, which allow the board to charge fees to a person who receives public health services from the department; §12.034, which requires the board to establish collection procedures and §12.035, which required the department to deposit all money collected for fees and charges under §§12.032 and 12.033 in the state treasury to the credit of the Texas Department of Health public health service fee fund; and §12.0122, which allows the department to enter into a contract for laboratory services.

The repeal affects Health and Safety Code, Chapter 12.

§73.22. Fee Schedule for Certification and Accreditation of Environmental Laboratories.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304846
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §§73.51, 73.54, 73.55

The amendments are proposed under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; §§12.031 and 12.032, which allow the board to charge fees to a person who receives public health services from the department; §12.034, which requires the board to establish collection procedures and §12.035, which required the department to deposit all money collected for fees and charges under §§12.032 and 12.033 in the state treasury to the credit of the Texas Department of Health public health service fee fund; and §12.0122, which allows the department to enter into a contract for laboratory services.

The amendments affect Health and Safety Code, Chapter 12.

§73.51. Fees.

(a) (No change.)

(b) Definitions. The following words and terms, when used in this section shall have the following meaning unless the context clearly indicates otherwise.

(1)-(2) (No change.)

(3) Fish tissue metals group - Arsenic, [~~mercury, copper, selenium,~~] cadmium, copper, [~~zinc, and~~] lead, mercury, selenium, and zinc.

(4) (No change.)

(5) ICP/ICP-MS drinking water metals group - Aluminum, arsenic, barium, beryllium, calcium, total hardness (calculated), chromium, copper, iron, lead, magnesium manganese, nickel, silver, sodium, and zinc.

(6) (No change.)

(7) Semi-volatile organic compounds in fish - 1,2,4,5-Tetrachlorobenzene, 1,2,3-trichlorobenzene, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,4-dichlorobenzene, 2,4,5-trichlorophenol, 2,4,6-trichlorophenol, 2,4-dichlorophenol, 2,4-dimethylphenol, 2,4-dinitrophenol, 2,4-dinitrotoluene, 2,6-dinitrotoluene, 2-chloronaphthalene, 2-chlorophenol, 2-methylnaphthalene, 2-methylphenol, 2-nitroaniline, 2-nitrophenol, 3,4-methylphenol, 3,3'-dichlorobenzidine, 3-nitroaniline, 4,5-dinitro-2-methylphenol, 4-bromophenyl-phenylether, 4-chloro-3-methylphenol, 4-chloraniline, 4-chlorophenyl-phenylether, 4-nitroaniline, 4-nitrophenol, acenaphthene, acenapthylene, aldrin, alpha-bhc, alpha-endosulfan, aniline, anthracene, benzidine, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, benzo(k)fluoranthene, benzoic acid, benzyl alcohol, beta-bhc, beta-endosulfan, bis(2-chloroethoxy)methane, bis(2-chloroethyl)ether, bis(2-chloroisopropyl)ether, bis(2-ethylhexyl)adipate, bis(2-ethylhexyl)phthalate, butylbenzylphthalate, chrysene, delta-bhc, dibenz(a,h)anthracene, [~~dinbenz(a,h)anthracene,~~] dibenzofuran, dieldrin, diethylphthalate, dimethylphthalate, di-n-butylphthalate, di-n-octylphthalate, diphenylhydrazine, endosulfan sulfate, endrin, endrin aldehyde, endrin ketone, fluoranthene, fluorene, heptachlor, heptachlor epoxide, hexachlorobenzene, hexachlorobutadiene, hexachlorocyclopentadiene, hexachloroethane, hexachlorophene, indeno-(1,2,3-cd)pyrene, [~~indent-(1,2,3-cd)pyrene,~~] isophorone, lindane, napthalene, nitrobenzene, n-nitrosodiethylamine, n-nitrosodimethylamine, n-nitroso-di-n-butylamine, n-nitroso-di-n-propylamine, n-nitrosodiphenylamine, p,p'-ddd, p,p'-dde, p,p'-ddt, pentachlorophenol, phenanthrene, phenol, pyrene, pyridine.

(8) (No change.)

(c)-(h) (No change.)

§73.54. Fee Schedule for Clinical Testing and Newborn Screening.

Fees for clinical testing and newborn screening shall not exceed the following amounts.

(1) Human specimens.

(A) Bacteriology.

(i) Aerobic isolation, comprehensive - $119 [~~$95~~].

(ii) Anaerobic isolation, comprehensive - $94 [~~$75~~].

(iii) Bioterrorism [~~Bioterriorism~~]:

(I) culture - $119 [~~$95~~]; and

(II) smear - $19 [~~$15~~].

(iv) Bordetella pertussis:

(I) culture - $138 [~~$110~~]; and

(II) molecular testing - $125 [~~$100~~].

(v) C. botulinum isolation - $94 [~~$75~~].

~~*(vi)* C. difficile - $95.~~]

(vi) [~~(vii)~~] Diphtheria culture - $113 [~~$90~~].

(vii) [~~(viii)~~] Drug susceptibility testing:

(I) VRE (vancomycin resistant enterococcus) - $63; [~~$50; and~~]

(II) VRSA (vancomycin resistant *Staphylococcus aureus*) - $63 [~~$50~~];

(III) MRSA (methicillin resistant *Staphylococcus aureus)* - $63;

(IV) *Neisseria gonorrhoeae* - $63; and

(V) One drug susceptibility testing - $63.

(viii) [~~(ix)~~] Enteric pathogens - $88 [~~$70~~].

(ix) Magnetic bead enrichment for *E. coli, Enterohemorrhagic E. coli*(EHEC) - $50.

(x) Fatty acid analysis - $63 [~~$50~~].

(xi) Genetic probe:

(I) [~~for~~] gonorrhea/chlamydia (GC/CT) - $31 [~~$25.~~];

(II) amplified probe for gonorrhea - $31;

(III) amplified probe for chlamydia - $31; and

(IV) amplified probe for gonorrhea/chlamydia -$63.

(xii) Identification and typing:

(I) EHEC [~~*E. coli, enterohemorrhagic E. coli* (EHEC)~~], only - $128 [~~$102~~];

(II) *Haemophilus* [~~*Hemophilus*~~] *influenzae* - $119 [~~$95~~];

(III) *Neisseria meningitides* [~~*Neiseria meningitidies*~~] - $119 [~~$95~~];

(IV) noncomplex typing (*Vibrio, Brucella*, etc.) - $63 [~~$50~~];

(V) other complex typing - $130 [~~$110~~];

(VI) *Salmonella* - $119 [~~$90~~];

(VII) *Shigella* - $73[~~$58~~]; [~~and~~];

(VIII) *Streptococcus*, Group A (GAS) - $88 [~~$70.~~]; and

(IX) Streptococcus, typing Groups B, C, D, G - $88.

(xiii) Molecular studies:

(I) pulsed-field gel electrophoresis [~~Pulsed-Field Gel Electrophoresis~~] (PFGE) - $125 [~~$100~~]; and

(II) polymerase chain reaction (PCR) - $56 [~~$45~~].

(xiv) Mycolic acid studies - $31 [~~$25~~].

(xv) *Neisseria gonorrhoeae* [~~*N. gonorrheae*~~] culture - $56 [~~$45~~].

(xvi) Pure culture identification:

(I) aerobes - $56 [~~$45~~];

(II) anaerobes - $100 [~~$80~~];

(III) *Campylobacter* - $69 [~~$55~~]; and

(IV) *Neisseria gonorrhoeae* [~~*N. gonorrheae*~~] - $69 [~~$55~~].

(xvii) *Streptococcus* screen - $25 [~~$20~~].

(xviii) Tissue:

(I) Lyme disease - $75 [~~$60~~];

(II) Rocky Mountain Spotted Fever (RMSF) [~~RMSF~~] - $75 [~~$60~~]; and

(III) relapsing fever - $113 [~~$90~~].

(xix) Toxin studies:

(I) *Botulinum* [~~botulinus~~] toxin - $163 [~~$130~~];

(II) *Clostridium* toxin - $44 [~~$35~~];

(III) Shiga toxin - $94; [~~$75; and~~]

(IV) Toxic Shock Syndrome Toxin-1 (TSST) - $88; [~~$70.~~] and

(V) *Vibrio cholera toxin* - $88.

(xx) *Vibrio* culture - $88 [~~$70~~].

(B) Clinical chemistry.

(i) Blood typing:

(I) ABO typing - $9.00 [~~$7.50~~];

(II) antibody screen (blood type) - $25 [~~$20~~];

(III) antigen typing (blood type) - $13 [~~$10~~];

(IV) antigen titering - $13 [~~$10~~]; and

(V) Rh typing - $13 [~~$10.50~~].

(ii) Cholesterol:

(I) cholesterol and high density lipoprotein (HDL) - $9.00 [~~$7.50~~]; and

(II) cholesterol only - $8.00 [~~$6.00~~].

(iii) Glucose:

(I) glucose, postprandial, 0 and 2 hours - $14 [~~$1~~];

(II) glucose, random, fasting - $7.00 [~~$5.50~~];

(III) glucose tolerance test, 1 hour - $14 [~~$11~~];

(IV) glucose tolerance test, 2 hour - $21 [~~$16.50~~]; and

(V) glucose tolerance test, 3 hour - $28 [~~$22~~].

(iv) Hemoglobin, total - $6.00 [~~$4.50~~].

(v) Hemoglobinopathy - $15 [~~$12~~].

(vi) Lead screen - $11 [~~$9.00~~].

(vii) Lipid profile, includes cholesterol; triglycerides; HDL; and low-density lipoprotein (LDL) - $28 [~~$22.00~~].

(viii) Phenylalanine - $38 [~~$30~~].

(ix) Phenylalanine/Tyrosine - $38 [~~$30~~].

(x) Tyrosine - $38.

(xi) [~~(x)~~] Thyroid profile includes total thyroxine (T4); free T4; and thyroid stimulating hormone (TSH) - $63 [~~$25~~].

(xii) [~~(xi)~~] TSH - $31 [~~$25~~].

~~*[(xii)* Tyrosine - $30.]~~

(xiii) Free T4 - $19 [~~$15~~].

(xiv) Total T4 - $16 [~~$12.50~~].

(C) DNA (Deoxyribonucleic acid) analysis:

(i) Beta-Globin 6 mutation panel (HbS, HbC, Hb E, HbD, Beta-Thalassemias-29 and -88) - $150;

(ii) Beta-Globin 5 mutation panel (HbS, HbC, Hb E, Beta-Thalassemias-29 and -88) - $138;

(iii) Hemoglobin S and C mutation Test - $88;

(iv) Hemoglobin E mutation test - $88;

(v) Beta-Thalassemia-29 and -88 mutation test - $100;

(vi) Beta-Thalassemia-29 mutation test - $63;

(vii) Beta-Thalassemia-88 mutation test - $63;

(viii) Hemoglobin D mutation test - $63;

(ix) Beta-Globin sequencing (from 105 of cap site to IVS-1-60 - $188;

(x) Beta-Globin sequencing (from 105 of cap site to IVS-1-60) added to another test - $100;

~~*[(i)* ß-Hemoglobulin panel (5 tests) - $85;]~~

(xi) [~~(ii)~~] Congenital adrenal hyperplasia - $538 [~~$430~~];

(xii) [~~(iii)~~] Congenital adrenal hyperplasia, DNA carrier analysis of family member - $206 [~~$165~~];

(xiii) [~~(iv)~~] Galactosemia - $506 [~~$405~~];

(xiv) [~~(v)~~] Galactosemia, DNA carrier analysis of family member - $206 [~~$165~~];

~~*f(vi)* Hemoglobinopathy study, E29n or E28 - $45;]~~

~~*f(vii)* Hemoglobinopathy study, S and C - $50;]~~

(xv) [~~(viii)~~] Phenylketonuria - $600 [~~$480~~]; and

(xvi) [~~(ix)~~] Phenylketonuria, DNA carrier analysis of family member - $206 [~~$165~~].

(D) Genetics:

(i) alpha fetoprotein (AFP) - $31 [~~$25~~];

(ii) ß-human chorionic gonadotropin (ß-HCG) - $16 [~~$12.50~~];

(iii) unconjugated estriol-3 (UE3) - $22 [~~$17.50~~]; and

(iv) triple screen, includes ß-HCG, UE3, and AFP - $63 [~~$50~~].

(E) Mycobacteriology/mycology.

(i) Acid fast bacillus (AFB):

(I) amplification only - $69 [~~$55~~];

(II) identification, referred isolates - $31 [~~$25~~];

(III) primary drug panel - $56 [~~$45~~];

(IV) probe only - $44 [~~$35~~];

(V) Pyrazinamide (PZA) only - $19 [~~$15~~];

(VI) secondary drug panel - $163 [~~$130~~];

(VII) smear and culture - $56 [~~$45~~];

(VIII) smear only - $19 [~~$15~~]; and

(IX) smear, culture and fungal culture - $131 [~~$105~~].

(ii) Direct High Performance Liquid Chromatography (HPLC), only - $31 [~~$25~~].

(iii) Fungus:

(I) culture - $75 [~~$60~~];

(II) identification - $69 [~~$55~~]; and

(III) probe only - $44 [~~$35~~].

(iv) *M. kansasii* susceptibility, Rifampin [~~rifampin~~] - $13 [~~$10~~].

(F) Newborn screening test kit, including screening panel - $38 [~~$30~~]. (Fees are based on the newborn screening test kits described in §73.21 of this title (relating to Newborn Screening), which includes the costs of the screening panel.)

(G) Parasitology.

(i) Blood/tissue parasites - $156 [~~$125~~].

(ii) *Giardia/Cryptosporidium* antigen screen - $94 [~~$75~~].

(iii) Intestinal parasites - $119 [~~$95~~].

(iv) Parasite culture - $169 [~~$135~~].

(v) Pinworm swab - $31 [~~$35~~].

(vi) Worm identification - $44 [~~$25~~].

(H) Serology.

(i) Arbovirus:

(I) immunoglobulin G (IgG) - $63 [~~$50~~];

(II) immunoglobulin M (IgM) - $88 [~~$70~~]; and

(III) panel - $150 [~~$120~~].

(ii) *Aspergillus* - $31 [~~$25~~].

(iii) *Brucella* - $16 [~~$12.50~~].

(iv) Cat scratch fever (*Bartonella*) - $50 [~~$40~~].

(v) Cytomegalovirus (CMV):

(I) IgG - $38 [~~$30~~];

(II) IgM - $44 [~~$35~~]; and

(III) panel - $44 [~~$35~~].

(vi) *Erlichia* - $50 [~~$40~~].

(vii) FTA (fluorescent triponemal antibody) only - $38 [~~$30~~].

(viii) Fungus:

(I) identification - $69 [~~$55~~]; and

(II) panel - $88 [~~$70~~].

(ix) Hantavirus, IgG/IgM - $94 [~~$75~~].

(x) Hepatitis A:

(I) IgM - $56 [~~$45~~]; and

(II) total - $13 [~~$10~~].

(xi) Hepatitis B:

(I) core antibody - $38 [~~$30~~];

(II) surface antibody (Ab) - $19 [~~$15~~]; and

(III) surface antigen (Ag) - $13 [~~$10~~].

(xii) Hepatitis B e Ab - $25 [~~$20~~].

(xiii) Hepatitis B e Ag - $19 [~~$15~~].

(xiv) Hepatitis C (HCV) - $15 [~~$12~~].

(xv) Hepatitis C (RIBA) - $175 [~~$140~~].

(xvi) Human immunodeficiency virus (HIV):

(I) confirmation - $44 [~~$35~~];

(II) screen - $13 [~~$10~~]; and

(III) viral load - $175 [~~$140~~].

(xvii) HIV/HCV panel - $28 [~~$22~~].

(xviii) Influenza A and B - $50 [~~$40~~].

(xix) *Legionella* - $69 [~~$55~~].

(xx) Lyme (*Borrelia*) IgG/IgM panel - $38 [~~$30~~].

(xxi) Miscellaneous serological tests - $38 [~~$30~~].

(xxii) Mumps:

(I) IgG - $38 [~~$30~~]; and

(II) IgM - $38 [~~$30~~].

(xxiii) Parvovirus B-19, IgG/IgM - $75 [~~$60~~].

(xxiv) Plague (*Yersinia*) - $19 [~~$15~~].

(xxv) Poliomyelitis (polio) I, II, III - $88 [~~$70~~].

(xxvi) Q-fever - $63 [~~$50~~].

(xxvii) *Rickettsia* Panel - $69 [~~$55~~].

(xxviii) *Rickettsia/Ehrlichia* Panel - $119 [~~$95~~].

(xxix) RPR (rapid plasma reagent test) - $6.00 [~~$5.00~~].

(xxx) RPR/syphilis confirmation - $16 [~~$12.50~~].

(xxxi) Rubella:

(I) IgG - $19 [~~$15~~];

(II) IgM - $38 [~~$30~~]; and

(III) screen - $9.00 [~~$7.50~~].

(xxxii) Rubeola:

(I) IgG - $38 [~~$30~~]; and

(II) IgM - $44 [~~$35~~].

(xxxiii) Toxoplasmosis:

(I) IgG - $50 [~~$40~~]; and

(II) IgM - $50 [~~$40~~].

(xxxiv) Tularemia (*Francisela*) - $56 [~~$45~~].

(xxxv) *Varicella zoster* - $56 [~~$45~~].

(xxxvi) VDRL (venereal disease research laboratory) test - $28 [~~$25~~].

(xxxvii) West Nile virus (WNV) - $19 [~~$15~~].

(I) Virology.

(i) *Chlamydia* culture - $100 [~~$80~~].

(ii) *Dengue* isolation - $100 [~~$80~~].

(iii) Electron microscope studies only - $356 [~~$285~~].

(iv) Herpes simplex isolation - $106 [~~$85~~].

(v) Influenza:

(I) surveillance - $156 [~~$125~~]; and

(II) subtyping - $131 [~~$105~~].

(vi) Virus:

(I) detection by PCR - $313 [~~$250~~];

(II) virus identification on submitted isolate (reference specimen) - $313 [~~$205~~]; and

(III) virus isolation, comprehensive - $263 [~~$210~~].

(2) Non-human specimens.

(A) Bacteriology.

(i) Environmental:

(I) Swabs - $31 [~~$25~~];

(II) *Legionella* - $88 [~~$70~~];

(III) bioterrorism - $250 [~~$200; and~~];

(IV) bioterrorism smear - $19; [~~$15.~~]

(V) thermometer calibration - $38; and

(VI) weight calibration - $38.

(ii) Food.

(I) Bioterrorism - $250 [~~$200~~].

(II) Botulism (*C. botulinum*) - $150 [~~$120~~].

(III) Pathogen panel:

(-a-) basic - $144 [~~$115~~]; and

(-b-) complex - $350 [~~$280.~~];

(IV) Single organism - $56 [~~$45~~].

(V) Standard plate count - $31 [~~$25~~].

(VI) Toxin - $56 [~~$45~~].

(iii) Milk and dairy products.

(I) Dairy, cultured - $44 [~~$35~~].

(II) Ice cream - $88 [~~$70~~].

(III) Milk:

(-a-) pasteurized milk panel - $119 [~~$95~~];

(-b-) raw milk panel - $150 [~~$120~~]; and

(-c-) single test - $88 [~~$70~~].

(iv) Seafood:

(I) brevitoxin - $250 [~~$200~~];

(II) fecal coliform - $50 [~~$40~~];

(III) standard plate count - $44 [~~$35~~]; and

(IV) *Vibrios* - $75 [~~$60~~].

(v) Water.

(I) Bay waters - $38 [~~$30~~].

(II) Coliform:

(-a-) fecal - $38 [~~$30~~]; and

(-b-) coliform, total - $50 [~~$40~~].

(III) Potable water - $31 [~~$25~~].

(IV) Reagent water suitability - $113 [~~$90~~].

(B) Entomology.

(i) Insect examination, Chaga's disease - $31 [~~$25~~].

(ii) Insect identification - $25 [~~$20~~].

(iii) Mosquito identification:

(I) adult, per carton - $63 [~~$50~~];

(II) egg paddle, per paddle - $8.00 [~~$5.00~~]; and

(III) larvae, per vial - $56 [~~$45~~].

(iv) Tick examination:

(I) Lyme disease, *Borrelia* and Rocky [~~Rock~~] Mountain Spotted Fever [~~spotted fever~~] (RMSF) - $44 [~~$35~~];

(II) relapsing fever - $44 [~~$35~~]; and

(III) tick [~~Tick~~] identification, per vial - $31 [~~$25~~].

(C) Parasitology. Water filter examination - $219 [~~$175~~].

(D) Serology.

(i) Arbovirus, equine, includes western equine encephalitis (WEE); eastern equine encephalitis (EEE); and west nile virus (WNV) [~~WNV~~] - $63 [~~$50~~].

(ii) Hantavirus, animal - $94 [~~$75~~].

(iii) Plague (*Yersinia*), animal - $19 [~~$15~~].

(E) Virology.

(i) Arbovirus isolation:

(I) avian - $44 [~~$35~~]; and

(II) mosquito - $75 [~~$60~~].

(ii) Arbovirus PCR:

(I) avian - $313 [~~$250~~]; and

(II) mosquito - $313 [~~$250~~].

(iii) Avian serology:

(I) arbovirus - $69 [~~$55~~]; and

(II) arbovirus (chicken) - $38 [~~$30~~].

(iv) Rabies testing - $81 [~~$65~~].

(v) Rabies virus typing:

(I) molecular - $156 [~~$125~~]; and

(II) monoclonal - $44 [~~$35~~].

(F) Handling fees.

(i) Pathogenic agents - $75 [~~$60~~];

(ii) Clinical specimens and environmental samples - $38 [~~$30~~].

§73.55. Fee Schedule for Chemical Testing of Environmental Samples.

Fees for chemical testing of environmental samples shall not exceed the following amounts.

(1) The following fees apply to the analysis of organic compounds in air:

(A) formaldehyde, National Institute Of Occupational Safety and Health (NIOSH) methods - $163 [~~$130~~];

(B) pesticides, NIOSH method [~~Method~~] - $200 [~~$160~~]; and

(C) VOCs, NIOSH method [~~Method~~] - $186 [~~$149~~].

(2) The following fees apply to the analysis of drinking [~~(including bottled)~~] water (including bottled water) samples.

(A) Inorganic parameters.

(i) Individual tests:

(I) alkalinity, total and phenolphthalein, Standard Methods (SM), 18th edition, 2320B - $29 [~~$23~~];

(II) bicarbonate-carbonate, with alkalinity, SM, 18th edition, 2320B - $19 [~~$15~~];

(III) bicarbonate-carbonate, without alkalinity, SM, 18th edition, 2320B - $29 [~~$23~~];

(IV) boron, SM, 18th edition, 4500B [~~4500B-B~~] - $66 [~~$53~~];

(V) bromate, Environmental Protection Agency (EPA) method 300.1 - $138 [~~$110~~];

(VI) bromide, EPA method 300.0 - $31 [~~$25~~];

(VII) carbon, total organic, SM, 18th edition, 5310C - $54 [~~$43~~];

(VIII) chlorate, EPA method 300.0 - $69 [~~$55~~];

(IX) chloride, EPA method 300.0 - $24 [~~$19~~];

(X) chlorine, SM, 19th edition, 4500-Cl F - $25 [~~$20~~];

(XI) chlorine dioxide, SM, 19th edition, 4500-ClO2 B - $100 [~~$80~~];

(XII) chlorite, EPA method 300.0 - $69 [~~$55~~];

(XIII) chloramines, SM, 19th edition, 4500-ClO2 D - $25 [~~$20~~];

(XIV) color, SM, 18th edition, [~~Ed.~~] 2120B - $30 [~~$24~~];

(XV) conductivity, [~~conductance~~] SM, 18th edition, 2510B - $24 [~~$19~~];

(XVI) cyanide, total, SM, 18th edition [~~EPA method~~] 4500 CN-B+C+E - $69 [~~$55~~];

(XVII) fluoride, EPA method 300.0 - $24 [~~$19~~];

(XVIII) hardness, EPA method 130.1 - $54 [~~$43~~];

(XIX) nitrate and nitrite as nitrogen, EPA method 353.2 - $28 [~~$22~~];

(XX) nitrate as nitrogen, EPA method 353.2 - $28 [~~$22~~];

(XXI) nitrite as nitrogen, EPA method 353.2 - $28 [~~$22~~];

(XXII) odor, EPA method 140.1, [~~SM, 18th edition,~~] 2150B - $63 [~~$50~~];

(XXIII) perchlorate, EPA method 314.0 - $69 [~~$55~~];

(XXIV) perchlorate, Unregulated Contamination Monitoring Regulation (UCMR), EPA method 314.0 - $76 [~~$61~~];

(XXV) pH, EPA method 150.1 - $24 [~~$19~~];

(XXVI) phenolics, total recoverable, EPA method 420.1 [~~4020.1~~] - $60 [~~$48~~];

(XXVII) residue, total, SM, 18th edition, 2540B - $28 [~~$22~~];

(XXVIII) silica, dissolved, SM, 18th edition, 4500Si F - $30 [~~$24~~];

(XXIX) solids, suspended, volatile or fixed, SM, 18th edition, 2540G - $39 [~~$31~~];

(XXX) solids, total dissolved, calculated, SM, 18th edition, 1030F - $18 [~~$14~~];

(XXXI) solids, total dissolved, determined, SM, 18th edition, 2540C - $39 [~~$31~~];

(XXXII) solids, total suspended, SM, 18th edition, 2540D - $39 [~~$31~~];

(XXXIII) sulfate, EPA method 300.0 - $24 [~~$19~~]; and

(XXXIV) turbidity, EPA method 180.1 - $25 [~~$20~~].

(ii) Routine water mineral group, EPA methods 150.1, 300.0, and 353.2, and SM, 18th edition, 2320B, 2510B, and 2540C [~~1030F~~] - $214 [~~$147~~].

(B) Metals analysis. A preparation fee applies to all drinking water samples analyzed by inductively coupled plasma (ICP) or by inductively coupled plasma-mass spectrometry (ICP-MS) with turbidity greater than or equal to 1 Nephelometric Turbidity Unit (NTU). The total analysis cost includes the sample preparation fee and the per-element or per-group fee.

(i) Sample preparation fee - total recoverable metals digestion, EPA method 200.2 - $36 [~~$29~~].

(ii) Per-element analysis fees:

(I) mercury, EPA method 245.1 - $31 [~~$25~~];

(II) single ICP, EPA method 200.7 - $24 [~~$19~~]; and

(III) single ICP-MS, EPA method 200.8 - $31 [~~$25~~].

(iii) Group fees:

(I) all metals drinking water group, EPA methods, 200.7, 200.8, and 245.1 - $330 [~~$264~~];

(II) ICP/ICP-MS metals drinking water group, EPA methods 200.7 and 200.8 - $206 [~~$165~~]; and

(III) lead/copper, EPA method 200.8 - $30 [~~$24~~].

(C) Organic compounds:

(i) chlorinated pesticides and PCBs in drinking water, EPA method 508 - $258 [~~$206~~];

(ii) chlorophenoxy herbicides, EPA method 515.1 or EPA method 515.4 - $275 [~~$220~~];

(iii) chlorophenoxy herbicides, UCMR, EPA method 515.1 or EPA method 515.4 - $303 [~~$242~~];

(iv) diquat and paraquat EPA method 549 - $303 [~~$242~~];

(v) ethylene dibromide (EDB) and dibromochloropropane (DBCP), EPA method 504.1 - $195 [~~$156~~];

(vi) endothall, EPA method 548 - $446 [~~$357~~];

(vii) glyphosate, EPA method 547 - $211 [~~$169~~];

(viii) haloacetic acids and dalapon, EPA method 552.2 - $275 [~~$220~~];

(ix) chlorinated disinfection-by-products (haloacetonitriles) EPA method 551.1 - $235 [~~$188~~];

(x) methylcarbamoyloximes [~~n-methylcarbomayloximes~~] and n-methylcarbamates (carbamate) pesticides, EPA method 531.1 - $250 [~~$200~~];

(xi) organochlorine pesticides, EPA methods 505 and 508 - $230 [~~$184~~];

(xii) phenols, UCMR List 2, EPA method 528.1 - $263;

~~*[(xii)* polynuclear aromatic hydrocarbons (PHA) and phthalates, EPA method 525.2 - $288;]~~

(xiii) phenylurea, UCMR List 2, EPA method 532.1 - $263;

(xiv) [~~xiii~~)] PHA and phthalates, UCMR, EPA method 525.2 - $396 [~~$317~~];

(xv) [~~(xiv)~~] PCB screening by perchlorination [~~Perchlorination~~], EPA method 508A - $366 [~~$293~~];

(xvi) polynuclear aromatic hydrocarbons (PHA) and phthalates, EPA method 525.2 - $360;

(xvii) [~~(xv)~~] semi-volatile organic compounds, EPA method 525.2 - $360 [~~$288~~];

(xviii) semi-volatile organic compounds, UCMR List 2, EPA method 526.1 - $263;

(xix) [~~(xvi)~~] trihalomethanes, EPA method 502.2 - $84 [~~$67~~];

(xx) [~~(xvii)~~] trihalomethanes, EPA method 524.2 - $84 [~~$67~~];

(xxi) [~~(xviii)~~] VOCs, EPA method 524.2 - $183 [~~$146~~]; and

(xxii) [~~(xix)~~] VOCs, UCMR, EPA method 524.2 - $223 [~~$178~~].

(D) Radiochemicals:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion - $165 [~~$132~~];

(ii) carbon-14, Liquid Scintillation - $123 [~~$98~~];

(iii) gross alpha and beta, EPA method 900.0 - $113 [~~$90~~];

(iv) gross alpha or beta, EPA method 900.0 - $100 [~~$80~~];

(v) gamma emitting isotopes, EPA method 901.1 - $94 [~~$75~~];

(vi) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry - $90 [~~$72~~];

(vii) radium-226, EPA method 903.1 - $83 [~~$66~~];

(viii) radium-228, EPA method 904.0 - $118 [~~$94~~];

(ix) radon, EPA method 903.1 - $83 [~~$66~~];

(x) strontium-89 or 90, EPA method 905.0 [~~905.1~~] - $126 [~~$101~~];

(xi) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry - $90 [~~$70~~];

(xii) total alpha emitting radium, EPA method 903.0 - $90 [~~$70~~]; .

(xiii) tritium, EPA method 906.0 - $64 [~~$51~~];

(xiv) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry - $95 [~~$76~~]; and

(xv) Composite/storage fee - $19 [~~$15~~].

(3) The following fees apply to the analysis of food [~~Food~~] and food products. [~~:~~]

(A) Inorganic analyses:

(i) [~~(A)~~] added substances, Association of Official Analytical Chemists (AOAC) [~~United States Department of Agriculture (USDA)~~] calculation - $16 [~~$13~~];

(ii) [~~(B)~~] added water, AOAC [~~USDA~~] calculation - $16 [~~$13~~];

(iii) [~~(C)~~] benzoate, AOAC [~~Association of Analytical Communities (AOAC)~~] method 960.38 - $101 [~~$81~~];

(iv) [~~(D)~~] cereal, USDA [~~UDSA~~] CRL method - $80 [~~$64~~];

(v) [~~(E)~~] deterioration, canned products, AOAC chart - $30 [~~$24~~];

(vi) [~~(F)~~] fat, dairy products, AOAC method 46.616 - $44 [~~$35~~];

(vii) [~~(G)~~] fat, paly screen, AOAC method 46.616 - $44 [~~$35~~];

(viii) [~~(H)~~] fat, soxhlet extraction, USDA method Fat-1 [~~Fat method~~] - $101 [~~$81~~];

(viv) [~~(I)~~] filth, AOAC methods - $44 [~~$35~~];

(x) [~~(J)~~] filth, beverages, AOAC method 965.38 - $44 [~~$35~~];

(xi) [~~(K)~~] filth, cereal foods, AOAC method 971.32 - $44 [~~$35~~];

(xii) [~~(L)~~] filth, [~~nuts and grains,~~] AOAC method 941.16 - $44 [~~$35~~];

[~~(M) filth, pasta, AOAC methods - $35;~~]

(xiii) [~~(N)~~] filth, spices, AOAC method 945.83 - $44 [~~$35~~];

(xiv) [~~(O)~~] food coloring, AOAC method 988.13 - $73 [~~$58~~];

(xv) fumonisin in corn products by high performance liquid chromatography (HPLC) - $250;

(xvi) [~~(P)~~] insect identification, Food and Drug Administration (FDA) Technical Bulletin #2 - $44 [~~$35~~];

[~~(Q) lead in food by flame atomic absorption spectrometry FLAAS - $36;~~]

(xvii) [~~(R)~~] maximum internal temperature, USDA ICT 2 method - $101 [~~$81~~];

(xviii) [~~(S)~~] meat protein, AOAC [~~USDA~~] calculation - $19 [~~$15~~];

(xix) [~~(T)~~] moisture (total water), USDA M01 method - $21 [~~$17~~];

(xx) [~~(U)~~] moisture-protein ratio, AOAC [~~USDA~~] calculation - $40 [~~$90~~];

(xxi) [~~(V)~~] package exam for rodent contamination, AOAC method 973.63 - $30 [~~$24~~];

(xxii) [~~(W)~~] pH of food products, AOAC method 981.12 - $25 [~~$20~~];

(xxiii) [~~(X)~~] protein, total, USDA protein block digestion - $73 [~~$58~~];

(xxiv) [~~(Y)~~] rodent pellet, identification, FDA Microscope Analytical Methods in Food and Drug Control - $44 [~~$35~~];

(xxv) [~~(Z)~~] salt, USDA method SLT [~~Salt method~~] - $131 [~~$105~~];

(xxvi) [~~(AA)~~] soy protein concentrate, USDA SOY1 [~~SOY 1~~] method - $80 [~~$64~~];

(xxvii) [~~(BB)~~] soya, USDA SOY1 [~~SOY 1~~] method - $80 [~~$64~~];

(xxviii) [~~(CC)~~] sulfite, AOAC method 980.17 - $83 [~~$66~~];

(xxix) [~~(DD)~~] water activity, AOAC method 978.18 [~~SM, 18th edition, 5910~~] - $44 [~~$35~~]; and

(B) [~~(EE)~~] Organic analysis, tetracycline in milk, FDA/AOAC methods - $125 [~~$100~~].

(C) Metals analyses. A sample preparation fee applies to all food samples analyzed by FLAA, GFAA, GHAA, ICP or ICP-MS techniques. The total analysis fee includes the sample preparation fee and the per-element fee. The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) Sample preparation fee - total recoverable metals digestion, EPA methods 200.2, 200.3, or SW-846 method 3050B - $46.

(ii) Per-element fees:

(I) mercury, EPA methods 245.1, 245.5, and 245.6, and SW-846 methods 7470A and 7471A - $40;

(II) single metal, FLAA or ICP, EPA 200 series methods and EPA SW-846 methods 6010 or 7000 series - $24;

(III) single metal, GFAA or GHAA, EPA 200 series methods and EPA SW 846 methods 7000 series, and SM, 18th edition, 3114 - $38; and

(IV) single metal, ICP-MS, EPA method 200.8, EPA SW-846 method 6020 - $31.

(4) The following fees apply to the analysis of soil [~~Soil~~] and solids:

(A) pH, Soil, EPA method 9045B - $28 [~~$22~~].

(B) Metals analysis. A sample preparation fee applies to the analysis of all solid (soil, sediment, etc.) samples. The total cost of the analysis will be the sample preparation fee plus the per-element [~~or per-group analytical~~] fee. [~~:~~] The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) Sample [~~sample~~] preparation fee - acid digestion of sediments, sludges, and soils, EPA SW-846 Method 3050B - $44 [~~$36~~].

(ii) Per-element [~~per-element~~] fee:

(I) lead in paint by FLAA [~~FLAAS~~] - $44 [~~$35~~];

(II) lead in pottery leachate by FLAA [~~FLAAS~~] - $33 [~~$26~~];

(III) lead and cadmium in pottery leachate by FLAA [~~FLASS~~] - $59 [~~$47~~];

(IV) lead in soil by FLAA [~~FLAAS~~] - $46 [~~$37~~];

(V) lead in solids by FLAA [~~FLAAS~~] - $44 [~~$35~~];

(VI) mercury, sediment, EPA method 245.5 and EPA SW-846 method 7471A - $40 [~~$32~~];

(VII) non-routine single metal, EPA 200 series methods and EPA SW-846 methods: 6010B, 6020, and 7000's - $60 [~~$48~~];

(VIII) silver, EPA method 200.7, and EPA SW-846 methods 6010B, 7760A, and 7761 - $60 [~~$48~~];

(IX) single metal, FLAA [~~FAAS~~] or ICP, EPA 200 series methods, 200.7, and EPA SW-846 6010B and 7000 series methods - $26 [~~$21~~];

(X) single metal, graphite furnace atomic absorption spectrometry (GFAA) or gas hydride atomic absorption spectrometry (GHAA), EPA 200 series methods and EPA SW-846 methods 7000 series, 7062, and 7742, and SM, 18th edition, 3114 - $38 [~~$30~~]; and

(XI) single metal, ICP-MS, EPA method 200.8 and EPA SW-846 method 6020 - $31 [~~$25~~].

(C) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion - $154 [~~$123~~];

(ii) gross alpha and beta, EPA method 900.0 - $101 [~~$81~~];

(iii) gross alpha or beta, EPA method 900.0 - $81 [~~$65~~];

(iv) gamma emitting isotopes, EPA method 901.1 - $140 [~~$112~~];

(v) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry - $90 [~~$72~~];

(vi) radium-226, DOE-RESL A-20/EPA method 903.1 - $133 [~~$109~~];

(vii) radium-228, DOE-RESL A-20/EPA method 904.0 - $110 [~~$88~~];

(viii) strontium-89 or 90, EPA method 905.0 [~~200.3~~] - $147 [~~$118~~];

(ix) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry - $88 [~~$70~~];

(x) tritium, EPA method-Azeotopic Distillation - $99 [~~$79~~]; and

(xi) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry - $86 [~~$68~~].

(5) The following fees apply to the analysis of tissue and vegetation samples. A tissue preparation (homogenization) fee applies to all seafood tissue samples analyzed for organic compounds and/or metals. The total analysis cost includes the tissue preparation fee, any analyte specific sample preparation fee, and the per-element or per-group test fee.

(A) Tissue preparation fees:

(i) fillets, EPA method 200.3 - $46 [~~$37~~]; and

(ii) whole fish and crabs, EPA method 200.3 - $80 [~~$64~~].

(B) Metals analyses. A sample preparation fee applies to all tissue samples analyzed by ICP or ICP-MS. The total analysis cost includes the sample preparation fee and the per-element or per-group fee:

(i) sample preparation fee - total recoverable metals digestion, EPA method 200.3 - $46 [~~$37~~].

(ii) per-element fees:

(I) mercury, EPA method 245.6 - $40 [~~$32~~];

(II) single metal, FLAA [~~FAAS~~] or ICP, EPA 200 series methods, 200.7, or EPA SW-846 methods 6010B, or 7000's - $24 [~~$19~~];

(III) single metal, GFAA or GHAA, EPA 200 series, methods and EPA SW-846 methods 7000 series, 7062, and 7742, and SM, 18th edition, 3114 - $38 [~~$30~~];

(IV) single metal, ICP-MS, EPA method 200.8, EPA SW-846 method 6020 - $31 [~~$25~~]; and

(iii) fish tissue (includes per group fee and total recoverable metals digestion fee) [~~metal group fee~~] - $283 [~~$189~~].

(C) Organic analyses. The [~~(the~~] organic analysis fee includes [~~fees include~~] any required sample cleanup procedures[~~)~~]:

(i) organochlorine pesticides and PCB's, fish fillets, PAM 304 E1 and EPA SW-846 methods 8081A - $1015 [~~$812~~];

(ii) organochlorine pesticides and PCB's, whole fish, PAM 304 E1 and EPA SW-846 methods 8081A - $1206 [~~$965~~];

(iii) semi-volatile organic compounds by gas chromatography/mass spectrometry (GC/MS), fish, JAOAC method and EPA SW-846 methods 3540C and 8270C - $648 [~~$518~~];

(iv) VOCs, GC/MS, fish, JAOAC method 64;653:ff and EPA SW-846 method 8260B - $311 [~~$249~~]; and

(v) organochlorine pesticides in vegetables by Gas Chromatography (GC) - $755 [~~$604~~].

(D) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion - $154 [~~$123~~];

(ii) gamma emitting isotopes, EPA method 901.1 - $138 [~~$110~~];

(iii) gross alpha and beta, EPA method 900.0 - $111 [~~$89~~];

(iv) gross alpha or beta, EPA method 900.0 - $81 [~~$65~~];

(v) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry - $90 [~~$72~~];

(vi) radium-226, DOE-RESL A-20/EPA method 903.1 - $136 [~~$109~~];

(vii) radium-228, DOE-RESL A-20/EPA method 904.0 - $98 [~~$78~~];

(viii) strontium-89 or 90, EPA method 905.0 [~~905.1~~] - $149 [~~$119~~];

(ix) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry - $88 [~~$70~~];

(x) tritium, EPA Method 906.0 Azeotopic Distillation - $99 [~~$79~~]; and

(xi) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry - $85 [~~$68~~].

(6) The following fees apply to the analysis of water [~~Water~~] and wastewater.

(A) Inorganic parameters:

(i) odor, EPA method 140.1 [~~SM, 18th edition, 2150B~~] - $65 [~~$50~~];

(ii) phenolics, total recoverable, EPA method 420.1 [~~4020.1~~] - $60 [~~$48~~]; and

(iii) UV 254, SM 19th edition, 5910 - $69 [~~$55~~].

(B) Metals analysis. The following sample preparation fees apply to the analysis of water and/or wastewater samples. The total cost of the analysis will be the required sample preparation fee plus the per-element [~~or per-group analytical~~] fee. [:] The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) Sample [~~sample~~] preparation fees:

(I) total recoverable metals digestion, EPA method 200.2 and EPA SW-846 methods 3005A, 3010A, and 3020A - $38 [~~$30~~]; and

(II) filtration (dissolved metals), EPA SW-846 method 3005A - $26 [~~$21~~].

(ii) Per-element [~~per-element~~] fees:

(I) mercury, EPA method 245.1 and EPA SW-846 method 7470A - $40 [~~$32~~];

(II) silver (includes separate digestion), EPA method 200.7 and EPA SW-846 methods 6010B, 7760A, and 7761 - $54 [~~$43~~];

(III) single metal, FLAA [~~FAAS~~] or ICP, EPA method 200.8, 200.7 and EPA SW-846 methods 6010B, and 7000 series - $24 [~~$19~~];

(IV) single metal, GFAA or GHAA, EPA method 200 series and EPA SW-846 methods 7000 series, 7062, and 7742, and SM, 18th edition, 3114 - $38 [~~$30~~]; and

(V) single metal, ICP-MS, EPA method 200.8, and EPA SW-846 method 6020 - $31 [~~$25~~].

(C) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion - $165 [~~$132~~];

(ii) carbon-14, Liquid Scintillation - $123 [~~$98~~];

(iii) gross alpha and beta, EPA method 900.0 - $113 [~~$90~~];

(iv) gross alpha or beta, EPA method 900.0 - $100 [~~$80~~];

(v) gamma emitting isotopes, EPA method 901.1 - $94 [~~$75~~];

(vi) plutonium, isotopes, DOE-RESL A-20 Alpha Spectrometry - $90 [~~$72~~];

(vii) radium-226, EPA method 903.1 - $101 [~~$81~~];

(viii) radium-228, EPA method 904.0 - $85 [~~$68~~];

(ix) radon, EPA method 903.1 - $83 [~~$66~~];

(x) strontium-89 or 90, EPA method 905.0 [~~905.1~~] - $126 [~~$101~~];

(xi) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry - $88 [~~$70~~];

(xii) total alpha emitting radium, EPA method 903.0 - $88 [~~$70~~];

(xiii) tritium, EPA method 906.0 - $64 [~~$51~~]; and

(xiv) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry - $90 [~~$76~~].

(7) The following fees apply to the analysis of wipes/filters/cartridges. [~~Wipe/filter/cartridge.~~]

(A) Lead analysis, FLAA [~~FLAAS~~] - $40 [~~$32~~].

(B) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion - $154 [~~$123~~];

(ii) carbon-14, Liquid Scintillation - $145 [~~$116~~];

(iii) gross alpha and beta, EPA method 900.0 - $65 [~~$52~~];

(iv) gross alpha or beta, EPA method 900.0 - $50 [~~$40~~];

(v) gamma emitting isotopes, EPA method 901.1 - $80 [~~$64~~];

(vi) plutonium isotopes, DOE-RESL A-20 Alpha Spectroscopy - $90 [~~$72~~];

(vii) radium-226, DOE-RESL A-20/EPA method 903.1 - $136 [~~$109~~];

(viii) radium-228, DOE-RESL A-20/EPA method 904.0 - $98 [~~$78~~];

(ix) strontium-89 or 90 EPA method 905.0 [~~905.1~~] - $148 [~~$118~~];

(x) thorium isotopes, DOE-RESL A-20 Alpha Spectroscopy - $88 [~~$70~~];

(xi) tritium, Azeotopic Distillation - $64 [~~$51~~]; and

(xii) uranium isotopes, DOE-RESL A-20 Alpha Spectroscopy - $85 [~~$68~~].

(8) Other chemical testing:

(A) blood identification, Source Book Forensic Serology - $31 [~~$25~~];

(B) dust identification - $58 [~~$46~~];

(C) identification of feces stains, AOAC method 981.22 - $159 [~~$127~~]; and

(D) urine stain identification, AOAC methods 963.28, [~~945.88, 942.24,~~] and 959.14 - $44 [~~$35~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304847

Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

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CHAPTER 83. PUBLIC HEALTH IMPROVEMENT GRANTS
SUBCHAPTER B. COMMUNITY HOSPITAL CAPITAL IMPROVEMENT FUND

The Texas Department of Health (department) proposes amendments to §§83.20 - 83.29 and repeal of §83.30, concerning the community hospital capital improvement fund.

The rules implement Government Code, Chapter 403, §§403.1066 - 403.1067, which identify the community hospital capital improvement fund as a dedicated account in the general revenue fund and delineate the department's responsibility to provide grants, utilizing the earnings of the fund, to public or nonprofit community hospitals with 125 beds or fewer located in an urban area of the state.

The amendments and repeal are needed to clarify the definitions of operating expense and rural area; reflect a name change of the Center for Rural Health Initiatives to the Office of Rural Community Affairs and correct the legal citation; delete a requirement for the submission of an annual report by grant recipients; revise the contact from the Commissioner of Health to the Grant Coordination Office and revise the grant title; remove references to application and review process due dates; and delete eligibility for continuation funding.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed the sections and has determined that reasons for adopting the sections continue to exist; however, the revisions are needed in order to reflect the changes to program administration and the laws that pertain to them.

The department published a Notice of Intention to Review for §§83.20 - 83.30 in the *Texas Register* on July 18, 2003 (28 TexReg 6975). No comments were received due to publication of the notice.

Peggy Belcher, Bureau of Budget and Revenue, has determined that for each year of the first five years the proposed amendments and repeal are in effect, there will be no fiscal implications to state and local governments as a result of administering the sections as proposed.

Ms. Belcher has also determined that for each year of the first five years the proposed amendments and repeal are in effect, the public benefit anticipated is the encouragement of some eligible hospitals to apply for a grant for which the hospitals may have not previously considered submitting an application. There will be no effect on small businesses or micro-businesses since such businesses are not eligible to receive grant funds under these rules, no anticipated economic costs to persons who are required to comply with the sections as proposed, and no anticipated impact on local employment.

Comments may be submitted to Peggy Belcher, Grant Coordination Office, Bureau of Budget and Revenue, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3199, (512) 458-7485 (telephone), (512) 458-7537 (fax), or E-mail peggy.belcher@tdh.state.tx.us. Comments on the proposed sections will be accepted for 30 days following publication in the *Texas Register*.

25 TAC §§83.20 - 83.29

The amendments are proposed under Government Code, Chapter 403, §403.1066, which enables the department to adopt rules governing grants made from the fund; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

The amendments affect the Government Code, Chapter 403, §§403.1066 - 403.1067.

§83.20. Purpose.

(a) (No change.)

(b) This subchapter governs the administration of [~~the~~] grants, the submission and review of grant applications, and the award of [~~the~~] grants.

§83.21. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) Operating expense - An expense, including an administrative expense, incurred in the daily operation of the grantee hospital. The costs of capital medical equipment leases are not operating expenses.

(8) Rural area - A county that has [~~had~~] a population [~~in the most recent decennial United States census~~] of 150,000 or less or, with respect to [~~or that part of~~] a county that has [~~with~~] a population of more [~~greater~~] than 150,000 and that contains a geographic area that is not delineated as urbanized by the federal census bureau, that part of the county that is not delineated as urbanized [~~United States Census Bureau~~].

(9) (No change.)

§83.22. Sources and Allocation of Funds.

(a) - (c) (No change.)

(d) The department shall have the authority and discretion to:

(1) determine the purpose(s) of [~~the~~] grants pursuant to law and this subchapter;

(2) - (4) (No change.)

(e) (No change.)

§83.23. Eligibility for Grants.

(a) (No change.)

(b) A hospital eligible to receive a rural health facility capital improvement grant, loan, or loan guarantee from the Office of Rural Community Affairs [~~Center for Rural Health Initiatives~~] under the Government Code, Chapter 487, Subchapter H, [~~Health and Safety Code,~~

~~Chapter 106, Subchapter G,~~] is not eligible to receive a grant under this subchapter.

§83.24. Requirements for Grants.

(a) - (b) (No change.)

~~[(c) Grant recipients shall submit an annual report to the department, in a form and at a time determined by the department.]~~

§83.25. Procedures for Grant Announcements.

(a) (No change.)

(b) The department shall maintain a list of persons to be notified of requests for proposals. Any person wanting to be placed on the list should contact: Grant Coordination Office, [~~Commissioner of Health,~~] Attention: Community Hospital Capital Improvement [~~TDH Innovation~~] Grants, 1100 West 49th Street, Austin, Texas, 78756.

(c) (No change.)

§83.26. Procedures for Grant Applications.

(a) - (c) (No change.)

(d) [~~Applicants will be given a minimum of 60 calendar days to file applications after a request for proposals is published.~~] Applications must be received by the department on or before the closing date specified in the request for proposals.

§83.27. Competitive Review Process.

(a) - (b) (No change.)

~~[(c) The department's review process shall be completed within 45 days after the closing date.]~~

§83.28. Selection Criteria.

(a) No grant shall be approved unless, in the opinion of the department, it addresses only capital improvements and does not propose to expend funds for [~~operating expenses or~~] debt retirement or operating expenses with the exception of capital medical equipment leases.

(b) (No change.)

§83.29. Project Approval.

(a) Grant recipients shall execute a contract with the department. The contract shall detail items including a [~~such as~~] budget, reporting requirements, general provisions for department grant contracts, and any other specifics that might apply to the award.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200304844
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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25 TAC §83.30

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Government Code, Chapter 403, §403.1066, which enables the department to adopt rules governing grants made from the fund; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of this rule implements Government Code, §2001.039.

The repeal affects the Government Code, Chapter 403, §§403.1066 - 403.1067.

§83.30. Continuation Funding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER B. IMMUNIZATION REQUIREMENTS IN TEXAS ELEMENTARY AND SECONDARY SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION

25 TAC §97.63

The Texas Department of Health (department) proposes an amendment to §97.63, concerning immunization requirements for children attending Texas child-care facilities and elementary schools regarding the DTaP requirement.

Recent outbreaks of pertussis throughout Texas have resulted in death and disability of children. There is currently no requirement for pertussis vaccination in children between the ages of 15 months and 5 years of age due to a publication error that was recently discovered. This rule will also align the DTP/DTaP immunization requirements for Texas students with the most recent Recommended Childhood and Adolescent Immunization Schedule issued by the Advisory Committee in Immunization Practices (ACIP).

Casey S. Blass, Chief, Bureau Immunization and Pharmacy Support, has determined that for the first five-year period that the section will be in effect there will be minimal fiscal implications to state and local government as a result of enforcing and administering the section as proposed. The addition of one more dose of DTaP vaccine to the school immunization requirements could increase associated costs to the state.

Mr. Blass has also determined that for each year of the first five years that the section is in effect the public benefit anticipated as a result of enforcing and administering the section as proposed will emerge as an increase in the immunization compliance rate of Texas children who attend schools and child-care facilities. No impact on micro-businesses or small businesses is expected because the cost administration of the additional dose of vaccine

will be covered by parents and insurance companies. The fiscal impact on parents is minimal, because most parents follow the recommended immunization schedule. The proposed change will not affect children who are already age-appropriately vaccinated against diphtheria, tetanus and pertussis. There will be no impact on local employment.

Comments on the proposal may be submitted to Janie Garcia, Immunization Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7284, or (800) 252-9152. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

This amendment is proposed under Health and Safety Code, §81.023, which requires the Board of Health (board) to develop immunization requirements for children; the immunization requirements are adopted as a statewide control measure for communicable disease as defined in Health and Safety Code, §§81.081 and 81.082; Education Code, §38.001, which allows the board to develop immunization requirements for admission to any elementary or secondary school; Human Resources Code, §42.043, which requires the department to make rules regarding the immunization of children admitted to child-care facilities; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This proposed amendment affects Health and Safety Code, §81.023; Texas Education Code, §38.001; and Human Resource Code, §42.043.

§97.63. Required Immunizations.

(a) - (b) (No change.)

(c) The following immunizations are required in the respective age groupings. A child or student must meet all the immunizations requirements specific to an age group upon first entering the age group. Implementation of requirements for hepatitis B vaccine for adolescents and varicella vaccine and hepatitis A for all ages is contingent upon the appropriation of funds to the department for these purposes. By July 1 of each odd-numbered year, the department will publish a statement on whether or not these vaccines have been funded and are required as specified.

(1) Children less than five years of age: polio vaccine; diphtheria-tetanus-pertussis (DTP) or diphtheria-tetanus-acellular pertussis (DTaP) vaccine; measles, mumps, and rubella vaccine (MMR); Haemophilus influenzae type b conjugate vaccine (HibCV), hepatitis A, and varicella vaccine.

(A) - (E) (No change.)

(F) Children 15 months of age through four years of age, but not yet five years of age [~~(15 months through four years of age)~~]:

(i) (No change.)

(ii) any combination of DTP/DTaP will meet the following requirement:

(I) children 17 months of age and younger are required to have three doses of DTP/DTaP vaccine; and

(II) children 18 months of age through three years of age are required to have four doses of DTP/DTaP vaccine. Pediatric diphtheria-tetanus (DT) vaccine is an acceptable substitute for DTP/DTaP vaccine if pertussis vaccine is medically contraindicated; and

(III) children four years of age are required to have five doses of DTP/DTaP vaccine. The fifth dose is not necessary if the fourth dose in the series is given on or after the fourth birthday. Pediatric diphtheria-tetanus (DT) vaccine is an acceptable substitute for DTP/DTaP vaccine if pertussis vaccine is medically contraindicated.

(iii) - (vi) (No change.)

(2) Children and students five years of age or older.

(A) (No change.)

(B) Diphtheria/Tetanus/Pertussis [~~Tetanus/Diphtheria~~].

(i) Five doses of a diphtheria-tetanus-pertussis containing vaccine in any combination are required. The fifth dose is not necessary if the fourth dose in the series is given on or after the fourth birthday. Pediatric diphtheria-tetanus (DT) vaccine is an acceptable substitute for DTP/DTaP vaccine if pertussis vaccine is medically contraindicated [~~Children and students six years of age and younger: at least four doses of DTP/DTaP, DT, or Td vaccine are required, provided at least one dose has been received on or after the fourth birthday. Pertussis vaccine is not required for children/students who are five years of age and older. Children with a medical contraindication to pertussis vaccine will need to have had only three doses of any combination of DTP/DTaP/DT/Td vaccines if their first dose was given on or after the first birthday and their third dose was given on or after the fourth birthday~~]. For further information see §97.77(c) and (d) of this title.

(ii) (No change.)

(C) - (H) (No change.)

(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
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CHAPTER 102. DISTRIBUTION OF TOBACCO SETTLEMENT PROCEEDS TO POLITICAL SUBDIVISIONS

25 TAC §102.1 - 102.5

The Texas Department of Health (department) proposes amendments to §§102.1 - 102.5, concerning the distribution of tobacco settlement proceeds to political subdivisions.

The rules implement the Government Code, Chapter 12, Subchapter J, which designates the department's responsibilities under the Agreement Regarding Disposition of Tobacco Settlement Proceeds (agreement) filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled The State of Texas v. The American Tobacco Co., et al., No. 5-96CV-91. The department collects information and certifies amounts of the tobacco settlement proceeds for annual distribution to political subdivisions. The term "political subdivision"

means a hospital district, another local political subdivision owning or maintaining a public hospital, or a county of the State of Texas responsible for providing indigent health care to the general public. The Health and Safety Code, Chapter 61, defines which entities are responsible for providing indigent health care to the general public.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed the sections and has determined that reasons for adopting the sections continue to exist; however, the revisions are needed in order to reflect the changes to program administration and the laws that pertain to them.

The department published a Notice of Intention to Review for §§102.1- 102.5 in the *Texas Register* on July 18, 2003 (28 TexReg 7025). No comments were received.

The amendments update a statutory reference, delete references to dates and activities that have already occurred, and clarify other language.

Peggy Belcher, Bureau of Budget and Revenue, has determined that for each year of the first five years the proposed amendments are in effect, there will be no fiscal implications to state and local governments as a result of administering the amended sections as proposed.

Ms. Belcher has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated is the assurance that expenditure statements identifying unreimbursed health care expenditures are accurately filed by political subdivisions which, in turn, results in the appropriate amount of funds being reimbursed for expenditures by local governments for health care services to the general public. There will be no effect on small businesses or micro-businesses since such businesses do not receive tobacco settlement proceeds, no anticipated economic costs to persons who are required to comply with the sections as proposed, and no anticipated impact on local employment.

Comments may be submitted to Peggy Belcher, Grant Coordination Office, Bureau of Budget and Revenue, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3199, (512) 458-7485 (phone), (512) 458-7537 (fax), or peggy.belcher@tdh.state.tx.us. Comments on the proposed sections will be accepted for 30 days following publication in the *Texas Register*.

The amendments are proposed under Health and Safety Code, Chapter 12, Subchapter J, §§12.138 - 12.139, which requires the department to adopt rules governing the distribution of tobacco settlement proceeds to political subdivisions; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

The amendments affect the Health and Safety Code, Chapter 12, Subchapter J.

§102.1. General.

(a) This chapter implements the Health and Safety Code, §§12.131 - 12.139 [~~Acts 1999, 76th Legislature, Chapter 753, Article 2 (House Bill 1161)~~] and the responsibilities of the Texas Department of Health (department) under the Agreement Regarding Disposition of Tobacco Settlement Proceeds (agreement) filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled The State of Texas v. The American Tobacco Co., et al., No. 5-96CV-91. The term "agreement" includes the subsequent Clarification of Agreement Regarding Disposition of Settlement Proceeds filed on July 24, 1998, in that litigation.

(b) (No change.)

§102.2. Distributions.

(a) (No change.)

(b) The income earned through investment of the permanent trust account established under the agreement will be distributed [~~for the first time in April 2001 and~~] in April of each [~~succeeding~~] year.

[~~(1)~~] Only the earnings of the account will be distributed. The corpus of the fund will remain in the permanent trust account.

[~~(2) Payments into the permanent trust account are scheduled in the agreement as follows:~~]

[~~(A) January 3, 2000 - $501.5 million;~~]

[~~(B) January 2, 2001 - $551.5 million;~~]

[~~(C) January 2, 2002 - $551.5 million; and~~]

[~~(D) January 2, 2003 - $201.4 million.~~]

[~~(c) The corpus of the lump sum trust account established under the agreement will be distributed in April 2000 and April 2001.~~]

[~~(1) The April 2001 lump sum distribution will be combined with the distribution of the first year's earnings from the permanent trust account.~~]

[~~(2) Payments into the lump sum trust account are scheduled in the agreement as follows:~~]

[~~(A) January 3, 2000 - $100 million; and~~]

[~~(B) January 2, 2001 - $50 million.~~]

(c) [~~(d)~~] A political subdivision that receives a pro rata share of the annual distribution has sole authority over the expenditure of those funds. The agreement does not require a political subdivision to expend any portion of the distribution for a specified purpose; however, any portion of the distribution expended for unreimbursed health care expenditures in a calendar year may be counted toward the political subdivision's pro rata share of the annual distribution in the subsequent year.

§102.3. Annual Claims.

(a) General. A [~~Beginning in calendar year 2000, a~~] political subdivision may claim a pro rata share of the annual distribution based on its "unreimbursed health care expenditures" in the previous calendar year. These expenditures are defined in the agreement as "those actual expenditures made by a Political Subdivision which are directly attributable to the provision of health care services to the general public, either directly or by contract or agreement with a third party provider, and for which no reimbursement is made by or expected from any third party source or fund. (Lump Sum Trust Account or Permanent Trust Account payments shall not count as reimbursement.)" The term "unreimbursed expenditures" does not include contractual allowances or discounts for health care services required under a third party payor agreement.

(b)- (f) (No change.)

§102.4. Regular Audits [~~audits~~].

(a) - (c) (No change.)

(d) A regular audit may include a review of any audit or financial statement of the political subdivision performed by persons other than the department. A political subdivision being audited by the department shall make available to the department or its contractor such an audit or financial statement at the department's or its contractor's request.

§102.5. Disputes.

(a) - (c) (No change.)

(d) An audit of the political subdivision that submitted the disputed information may be performed.

(1) (No change.)

(2) The political subdivision shall fully cooperate in the audit. The audit may include a review of any audit or financial statement of the political subdivision.

(e) (No change.)

(f) A political subdivision for which an audit indicates an overstatement may request in writing a hearing on the matter within 20 days of receiving written notice from the department of the audit findings. The notice shall state whether a monetary penalty is proposed. A monetary penalty may not exceed 10 [~~ten~~]% of the overstated unreimbursed health care costs. A monetary penalty may be imposed if the political subdivision failed to exercise reasonable diligence to comply with the requirements of these rules.

(g) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER B. CARE OF ANIMALS BY CIRCUSES, CARNIVALS, AND ZOOS

25 TAC §§169.41 - 169.48

The Texas Department of Health (department) proposes amendments to §§169.41 - 169.48, concerning the care of animals by circuses, carnivals, and zoos. Specifically, the sections cover purpose; definitions; facilities for housing the animals; food and water requirements; care in transit; licenses; and state inspection agents. The amended language aligns with current state law and clarifies the requirements for meeting standards.

The rules are being amended in accordance with Government Code, §2001.039, which requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedures Act). Sections 169.41 - 169.48 have been reviewed and the department has determined that reasons for adopting the sections continue to exist, in that rules on these subjects are needed and are mandated by Occupations Code, Chapter 2152.

The department published a Notice of Intention to Review for §§169.41 - 169.48 as required by Government Code, §2001.039, in the *Texas Register* on May 19, 2000 (25 TexReg 4598). The department received no comments due to the publication of the notice.

Jane C. Mahlow, DVM, MS, Director of Zoonosis Control Division, has determined that for each year of the first five years that the sections will be in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

Dr. Mahlow has also determined that for each year of the first five years the sections are in effect the public health benefit anticipated as a result of these amendments will be to promote humane conditions for these animals and to promote public health and safety. There is no anticipated cost to small businesses or micro-businesses, nor to persons who are required to comply with the sections as proposed, because the rules make no additional substantive operational requirements of owners, except those that will result in more efficient operation of the circus, carnival, or zoo. There is no increase in the fee charged for a license. There is no anticipated effect on local employment.

Comments on the proposal may be submitted to Jane C. Mahlow, DVM, MS, Texas Department of Health, Zoonosis Control Division, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 458-7255, or jane.mahlow@tdh.state.tx.us. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

The amendments are proposed under the Occupations Code, Chapter 2152, "Regulation of Circuses, Carnivals, and Zoos," §2152.051, which requires the Texas Board of Health (board) to adopt rules necessary to administer the chapter; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed amendments affect Occupations Code, Chapter 2152. The review of the rules implements Government Code, §2001.039.

§169.41. Purpose. [~~Introduction~~]

The purpose of these rules is to establish standards regarding the care of animals in circuses, carnivals, and zoos which will promote humane conditions for these animals and public health and safety.

§169.42. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act - Occupations Code, Chapter 2152[~~Texas Civil Statutes Article 4447v~~], the legislative authority for these rules.

[~~(2) Animal - Any live, warm-blooded animal which is used for exhibition purposes; except domestic farm animals used for food and fiber.~~]

(2) [~~(3)~~] Board - Texas Board of Health.

(3) [~~(4)~~] Commissioner - Commissioner of the Texas Department of Health.

(4) [~~(5)~~] Department - Texas Department of Health (TDH).

(5) [(6)] Housing facility - Any room, building, or area used to contain a primary enclosure or enclosures.

(6) [(7)] Primary enclosure - Any structure used to immediately restrict an animal or animals to a limited amount of space, such as a room, pen, run, cage, compartment or hutch.

(7) [(8)] Sanitize - To make physically clean and to destroy disease-producing agents.

(8) [(9)] Zoonosis Control Division (ZCD) - Division [of the Bureau of Veterinary Public Health] of the Texas Department of Health to which the responsibility for implementing these rules is [as] assigned.

§169.43. Facilities for Housing the Animals.

(a) - (b) (No change.)

(c) Outdoor holding facilities shall:

(1) (No change.)

(2) provide adequate shelter to protect animals from any form of overheating, direct rays of the sun, [or] cold or inclement weather, and direct effects of wind, rain, or snow;

(3) - (5) (No change.)

(d) - (i) (No change.)

§169.44. Transportation of Animals.

(a) Primary enclosure construction. All compartments, transport cages, cartons, or crates shall be constructed [in] such [a manner] that:

(1) - (8) (No change.)

(b) - (c) (No change.)

§169.45. Food and Water Requirements.

(a) Each live animal shall be fed a sufficient quantity of food at least once in each 24-hour period unless there are special instructions given by a licensed veterinarian. The food shall be free from contamination, wholesome, palatable, and of sufficient quality and nutritive value to meet the normal requirements for the condition and size of the animal(s).

(b) Potable water shall be provided at all times or at least twice daily for periods of not less than one hour, except as directed by a licensed veterinarian [every 12 hours].

§169.46. Care in Transit.

The carrier, driver, or other employee shall be responsible to:

(1) - (3) (No change.)

(4) provide shade to protect the live animal when sunlight is likely to cause overheating or discomfort in such a manner that the surrounding air temperature should not fall below 50 degrees Fahrenheit (10 degrees Celsius) [7.2 degrees Celsius (45 degrees Fahrenheit)] nor be allowed to exceed 85 degrees Fahrenheit (29.5 degrees Celsius) [29.5 degrees Celsius (85 degrees Fahrenheit)]; and

(5) (No change.)

§169.47. Licenses.

(a) - (f) (No change.)

(g) Any facility that does not meet required standards will not be licensed by TDH [Denial, suspension, and revocation. The basis an actions will be as outlined in Texas Civil Statutes Article 4447v, §9; Texas Civil Statutes Article 6252-13a, §§13-20; and the board's formal hearing procedures, §§1.21-1.32 of this title (relating to Formal Hearing Procedures)].

§169.48. State Inspection Agents.

Each agent inspecting [employed to inspect] circuses, carnivals, or zoos under Occupations Code, Chapter 2152 [Texas Civil Statutes Article 4443, §8], will be approved [certified] by the director, Zoonosis Control Division.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
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SUBCHAPTER C. TRAINING OF ANIMAL SHELTER PERSONNEL

25 TAC §§169.61 - 169.65

The Texas Department of Health (department) proposes amendments to §§169.61 - 169.65, concerning the training of animal shelter personnel. Specifically, the sections cover the purpose, definitions, courses, prerequisites for course attendance, and course content. The amended language aligns with current state law.

The rules are being amended in accordance with Government Code, §2001.039, which requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). Sections 169.61 - 169.65 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on these subjects are needed; however, revisions were necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §§169.61 - 169.65 as required by Government Code, §2001.039, in the *Texas Register* on May 19, 2000 (25 TexReg 4598). The department received no comments due to the publication of the notice.

Jane C. Mahlow, DVM, MS, Director of Zoonosis Control Division, has determined that for each year of the first five years that the sections will be in effect there will be an anticipated $33,750 per year income to the state that may be paid by local governments as a result of enforcing or administering the sections as proposed. The projected amount is based on current enrollment at the training courses (an average of 450 students) multiplied by an estimated $75 per student fee. However, Animal Control Officer training course attendance by animal shelter employees is elective, not mandatory. It is anticipated that the number of animal shelter employees registering for courses will decline due to the increase in course costs. A course fee is required by statute, Health and Safety Code, §823.004. If the highest fee of $225 per student to cover program costs were to be charged, the cost would be prohibitive for students to attend and would cause

the demise of this mandated training program. The rule amendments shift this fee from the optional purchase of the course training manual to a registration fee.

Dr. Mahlow has also determined that for each year of the first five years the sections are in effect the public health benefit anticipated as a result of this will be to allow the fees to remain flexible to reflect current economic trends so animal shelter personnel can continue to receive training; animal shelter personnel serve a pertinent role in the control of zoonotic diseases. There is no anticipated cost to small businesses or micro-businesses nor to persons who are required to comply with the sections as proposed because they are not participants in this type of training. There is no anticipated effect on local employment.

Comments on the proposal may be submitted to Jane C. Mahlow, DVM, MS, Texas Department of Health, Zoonosis Control Division, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 458-7255, or jane.mahlow@tdh.state.tx.us. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, Chapter 823, "Animal Shelters," §823.004, which requires the Texas Board of Health (board) to prescribe standards and reasonable fees for training animal shelter personnel in animal health and disease control, humane care and treatment of animals, control of animals in an animal shelter, and transportation of animals; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect Health and Safety Code, Chapter 823.

§169.61. Purpose.

The purpose of these sections is to set standards [~~and charge fees~~] for the training of animal shelter and animal control personnel as to animal health and disease control, humane care and treatment, transportation of animals, and the control of animals in an animal shelter.

§169.62. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Animal Control Officer (ACO) course--An appropriate training session administered by the department [~~Texas Department of Health (department)~~]. There are three types of training: basic, advanced, and administrative.

(2)-(3) (No change.)

§169.63. Courses.

(a) The basic ACO course gives introductory instruction in the topics listed in §169.65 [~~§169.65(a)~~] of this title (relating to Course Content).

(b) (No change.)

(c) The administrative ACO course includes instruction in supervisory and management skills needed [~~necessary~~] to implement and direct application of the concepts taught in the basic and advanced courses.

§169.64. Prerequisites for Course Attendance.

(a) Basic, advanced, or administrative. A person must apply [~~have applied~~] for attendance with the [~~department's~~] Regional Zoonosis Control Program conducting the ACO course. Course enrollment will be based on space availability policies set by the region hosting the course.

(b) Basic, advanced, or administrative. A fee will be charged for each person attending an ACO course. The fee will not exceed the amount equal to the cost of conducting the ACO course divided by the expected number of participants; this fee will not exceed $225.

(c) [~~(b)~~] Advanced. A person must have:

(1) satisfactorily completed a basic ACO course and, subsequently, worked or volunteered in animal shelter/animal control activities at least 2,000 hours; and

(2) provided a recommendation from the individual's supervisor, including [~~to include~~] a statement that the person meets prerequisites for course attendance.

(d) [~~(c)~~] Administrative. A person must provide a recommendation from the individual's supervisor, including [~~to include~~] a statement that the person meets one of the following prerequisites for course attendance:

(1) satisfactory completion of [~~satisfactorily completed~~] an advanced ACO course;

(2) experience [~~worked~~] in an administrative position for two years; or

(3) completion of [~~completed~~] 60 hours of college credit.

§169.65. Course Content.

[~~(a)~~] The basic and advanced courses will include technical coverage of topics deemed pertinent to animal shelter/animal control personnel by the department's Zoonosis Control Division (ZCD) including, but not limited to, animal health and disease control, humane care and treatment of animals, control of animals in an animal shelter, and the transportation of animals. The administrative course will include instruction in supervisory and management skills necessary to implement and support the concepts taught in the basic and advanced courses.

[~~(b) There is no cost for attending a course. However, the Animal Control Officer Training Manual, which can be purchased from the department, is an essential reference.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 265. GENERAL SANITATION
SUBCHAPTER B. TEXAS YOUTH CAMPS SAFETY AND HEALTH

25 TAC §265.26

The Texas Department of Health (department) proposes new §265.26, concerning the prohibition of nudity at youth camps except in limited situations. Specifically, new §265.26 provides

that a youth camp may not allow campers to be nude, except when taking a bath or shower in the camp's designated bathing or showering facilities, or when changing clothing and/or undergarments in the camp's designated cabins, dormitories, or other residential structures. The new section is necessary for the department to carry out its responsibilities under the Texas Youth Camp Safety and Health Act, Health and Safety Code, Chapter 141. The new rule is not due to recent legislation, but is in response to published comments from nudist associations that plan to operate nudist youth camps in Texas during the 2004 camping season.

Elias Briseno, Director, General Sanitation Division, has determined that for each year of the first five-year period the section is in effect, there will be no fiscal implications to state or local government as a result of administering the section as proposed.

Mr. Briseno has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be to further protect public health by prohibiting nudity at youth camps where minors gather. There will be no costs to micro-businesses or small businesses to comply with the section as proposed, based on the department's interpretation of the rule and the lack of specific information that any particular nudist youth camp intends to apply for a youth camp license. There are no anticipated economic costs to persons who are required to comply with the section as proposed unless costs are incurred as a result of a rule violation. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Elias Briseno, Director, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6600, Extension 2303, Fax (512) 834-6707. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The new section is proposed under the Health and Safety Code, §141.009, which provides the Texas Board of Health (board) with the authority to adopt rules to establish health and safety standards for youth camps; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new section affects Health and Safety Code, Chapter 141.

§265.26. Nudity Prohibited.

A youth camp may not allow campers to be nude, except when taking a bath or shower at the camp's designated bathing or showering facilities, or when changing clothing and/or undergarments in the camp's designated cabins, dormitories, or other residential structures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER J. ADVISORY COMMITTEE

25 TAC §265.131

The Texas Department of Health (department) proposes an amendment to §265.131, concerning the Registered Sanitarian Advisory Committee (committee). The committee has provided advice to the Texas Board of Health (board) and the department related to rules regarding registered professional sanitarians. The committee is established under the Health and Safety Code, §11.016, which allows the board to establish advisory committees. The committee is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §265.131 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review for §265.131 in the *Texas Register* on July 11, 2003 (28 TexReg 5549). No comments were received due to publication of this notice.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110), which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 2001, the board established a rule relating to the Registered Sanitarian Advisory Committee. The rule states that the committee will automatically be abolished on September 1, 2003. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until September 1, 2007.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to: continue the committee until September 1, 2007; specify that the committee appoints its presiding and assistant presiding officers; include additional requirements regarding statements by members; and clarify the components that the committee must include in an annual report to the board.

Jacquelyn McDonald, Director of the Office of the Board of Health, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state and local government as a result of administering the section as proposed.

Ms. McDonald has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of amending the section will be to provide a continuance of the committee and continued advice to the department on this important issue. There will be no costs to small business or micro-business resulting from compliance with this section, as this section addresses only continuance of the committee; terms of office; statements by members; and information to be included in the annual report. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments may be submitted to Jacquelyn McDonald, Director, Office of the Board of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7484. Comments on the proposed section will be accepted for 30 days following publication in the *Texas Register*.

The amendment is proposed under Health and Safety Code, §11.016, which allows the board to establish advisory committees; Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner; and Government Code, §2110.005, which requires the department to adopt rules stating the purpose and tasks of its advisory committees.

The proposed amendment affects the Health and Safety Code, Chapters 11 and 12; and the Government Code, Chapter 2110. The review of this rule implements Government Code, §2001.039.

§265.131. Registered Sanitarian Advisory Committee.

(a)-(d) (No change.)

(e) Review and duration. By September 1, 2007 [~~2003~~], the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f)-(g) (No change.)

(h) Officers. The committee [~~chairman of the board~~] shall elect from its members [~~appoint~~] a presiding officer and an assistant presiding officer to begin serving on September 1 of each odd-numbered year.

(1)-(2) (No change.)

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will [~~serve until a successor is appointed to~~] complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled [~~temporarily~~] by vote of the committee [~~until a successor is appointed by the chairman of the board~~].

(5)-(6) (No change.)

(i) Meetings. The committee shall meet only as necessary [~~at least once each year~~] to conduct committee business.

(1)-(7) (No change.)

(j)-(m) (No change.)

(n) Statement by members.

(1)-(2) (No change.)

(3) A committee member should not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member should not disclose confidential information acquired through his or her committee membership.

(5) A committee member should not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee shall publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) (No change.)

(2) The report shall identify the costs related to the committee's existence, including the cost of department staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(3) (No change.)

(p) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 289. RADIATION CONTROL
SUBCHAPTER D. GENERAL

25 TAC §289.205

The Texas Department of Health (department) proposes an amendment to §289.205, concerning hearing and enforcement procedures.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.205 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §289.205 regarding Government Code, §2001.039, in the *Texas Register* (28 TexReg 1663) on February 21, 2003. No comments were received by the department on this section following publication of the notice.

The proposed revision changes references to the Formal Hearing Procedures throughout the rule to properly cite the references. The words "agency rule" and "rules" were deleted throughout the section and replaced with "requirements of this chapter" for consistency with language used throughout the chapter. The definition of "Administrative Law Judge (ALJ)" was added to §289.205(b) to accurately state who will be responsible for conducting hearings for the department. Subsequently, the definition of "Hearing examiner" was deleted since this term is

now obsolete as a result of the responsibility of the department's hearings now belonging to the administrative law judge. As a result of deleting the definition of "hearing examiner", the term "hearing examiner" was deleted throughout the section and replaced with "ALJ." In §289.205(b)(18), the word "Fund" was changed to "Account" and the words "A fund" are changed to "An account" to accurately state the name of the account as a result of implementing changes authorized by House Bill 1678 (78th Legislature 2003). The word "writing" was deleted and replaced with the words "submitting a written request to" to clarify the intent of the rule in §289.205(c)(2), (g)(3), (h)(2), and (i)(9). In §289.205(g)(1)(C), the words "violation of, or" are added at the beginning of the sentence for consistency with language used throughout the chapter. At the end of the last sentence of §289.205(g)(2), the word "receipt" was replaced with the word "service" to be consistent with the use of this term as addressed in this section. In §289.205(g)(3), (h)(2), and (i)(9), the words "or date of mailing" were deleted and replaced with "of the notice" to use the correct term as addressed in this section. In §289.205(i)(3)(C), the word "applicable" was replaced with the words "any of the" for consistency with language used throughout the chapter. The words "occupational and" are added before the words "...public health..." to be consistent with language used throughout this chapter. In §289.205(j), the term "administrative penalties" was changed from upper case to lower case to reflect the correct form and style for rule text. The words "...that could have been prevented by corrective action and for which the licensee, registrant, or certified industrial radiographer did not take effective corrective action" are deleted at the end of §289.205(j)(3)(A) to more accurately describe the process for administering administrative penalties. The wording "returning the source of registration to a licensee" was changed to "returning the source of radiation to a licensee" in §289.205(l)(2)(C) because the original wording was incorrect. The last sentence of current §289.205(l)(4), was deleted as this language was redundant. In §289.205(m)(5)(B), "Fund" was replaced with "Account" to accurately state the name of the account as a result of implementing changes authorized by House Bill 1678 (78th Legislature 2003). In the last sentence of §289.205(m)(6), the words "makes a written application to the agency for a hearing" were replaced with "submits a written request to the director," the words "date of the" are added before "order," and "date" are deleted at the end to clarify the intent of the rule. The words "of the State Office of Administrative Hearings" replaced the word "agency" to accurately state the hearing location. The following changes were made because the requirements are not limited to licensees, registrants, or certified industrial radiographers. The requirements apply to any person not complying with the requirements of this chapter. In current §289.205(b)(8), the word "person" replaces "licensee, registrant, or a certified industrial radiographer." The definition of "Notice of Violation" in §289.205(b)(13) was changed from, "The notice normally requires the licensee, registrant, certified mammography system, or certified industrial radiographer to provide..." to "The notice requires the person receiving the notice to provide..." and in §289.205(b)(13)(A) the word "person" replaces "the licensee, registrant, certified mammography system, or certified industrial radiographer." The words "and other persons" was added to the end of the title of §289.205(i). Section 289.205(i)(1) was changed from "A licensee, registrant, or certified industrial radiographer who commits..." to "A licensee, registrant, certified industrial radiographer, or other person who commits..." The words ", or other persons" are added to the title of §289.205(k) and §289.205(k)(1). In §289.205(m), the words "for licenses, certificates of registration, or certified industrial radiographers" were deleted. The last sentence of §289.205(m)(1) was deleted. The word "licensee" was replaced with the word "person" in §289.205(m)(2)(B). The words "licensee, registrant, or certified industrial radiographer" were replaced with the words "person receiving the order" in the first sentence of §289.205(m)(6) and the word "person" replaced the words "licensee, registrant, or certified industrial radiographer" in the second sentence of that same paragraph.

This amendment is part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, or other factors.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the proposed section will be in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that rules are clear and specific and that those persons regulated are informed of the appropriate hearing and enforcement procedures. There will be no fiscal impact on applicants/licensees that are small businesses, micro-businesses or other persons required to comply with the rule. No additional costs will be incurred because no additional requirements are added. The revisions correct reference citations and clarify the intent. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 1:30 p.m., Tuesday, September 30, 2003, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The amendment affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.205. Hearing and Enforcement Procedures.

(a) Purpose. This section governs the following in accordance with the Texas Radiation Control Act (Act), the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 [~~Chapter 1, §§1.21-1.34~~] of this title (relating to the Texas Board of Health):

(1) (No change.)

(2) determining compliance with or granting of exemptions from the requirements of this chapter [~~agency rule~~], order, or condition of the license or certificate of registration;

(3)-(4) (No change.)

(b) Definitions. The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Administrative Law Judge (ALJ) - Administrative law judge from the State Office of Administrative Hearings.

(3) [~~(2)~~] Applicant - A person seeking a license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification, issued under the provisions of the Act and the requirements in this chapter.

(4) [~~(3)~~] Board - The Texas Board of Health.

(5) [~~(4)~~] Certified industrial radiographer - An individual who meets the definition of radiographer as stated in §289.255(c) of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(6) [~~(5)~~] Commissioner - The Texas commissioner of health.

(7) [~~(6)~~] Contested case - A proceeding in which the agency determines the legal rights, duties, or privileges of a party after an opportunity for adjudicative hearing.

(8) [~~(7)~~] Director - The director of the radiation control program under the agency's jurisdiction.

(9) [~~(8)~~] Enforcement conference - A meeting held by the agency with management of a person [~~licensee, registrant, or a certified industrial radiographer~~] to discuss the following:

(A) safety, safeguards, or environmental problems;

(B) compliance with regulatory, license condition, or registration condition requirements;

(C) proposed corrective measures including, but not limited to, schedules for implementation; and

(D) enforcement options available to the agency.

(10) [~~(9)~~] Hearing - A proceeding to examine an application or other matter before the agency in order to adjudicate rights, duties, or privileges.

[~~(10) Hearing examiner - An attorney selected by the agency to conduct hearings.~~]

(11) Interested person - A person who participates in a hearing concerning a contested case but who is not admitted as a party by the ALJ [~~hearing examiner~~].

(12) (No change.)

(13) Notice of violation - A written statement of one or more alleged infringements of a legally binding requirement. The notice [~~normally~~] requires the person receiving the notice [~~licensee, registrant, certified mammography system, or certified industrial radiographer~~] to provide a written statement describing the following:

(A) corrective steps taken by the person [~~licensee, registrant, certified mammography system, or certified industrial radiographer,~~] and the results achieved;

(B)-(C) (No change.)

(14) (No change.)

(15) Party - A person designated as such by the ALJ [~~hearing examiner~~]. A party may consist of the following:

(A)-(C) (No change.)

(16)-(17) (No change.)

(18) Radiation and Perpetual Care Account [~~Fund~~] - An account [~~A fund~~] established [~~in the state treasury~~] for the purposes described in the Act, §401.305.

(19)-(21) (No change.)

(c) Procedures for licensing actions under the Act, §401.054.

(1) Except as provided in subsections (d)-(f) of this section, when the agency grants, renews, denies, transfers, or amends any specific license for the possession of radioactive materials, or grants exemptions from requirements of this chapter [~~rules~~], orders, or licenses in accordance with the Act, the agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified by subsequent action of the agency.

(2) Any person who considers himself/herself a person affected by an agency action described in paragraph (1) of this subsection or any applicant/licensee may request a hearing by submitting a written request to [~~writing~~] the director within 30 days after the notice is published in the *Texas Register*.

(A)-(B) (No change.)

(3) Either the applicant/licensee or the agency may contest the standing of a requestor as a person affected by motion filed with the ALJ [~~hearing examiner~~] no later than ten days prior to the hearing. The requestor has the burden of proof in a hearing to determine whether the requestor is a person affected.

(4) The ALJ [~~hearing examiner~~] may designate parties at the commencement of the hearing on the merits.

(5) (No change.)

(d) Special procedures for issuing, renewing, or amending byproduct material licenses in accordance with §289.260 of this title.

(1)-(3) (No change.)

(4) When a hearing is requested in writing within 30 days after publication of the notice described in paragraph (2) of this subsection, the procedures described in subsection (c)(3) and (4) of this section and Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 [~~Chapter 1, §§1.21-1.34~~] of this title apply. Failure to submit a written request for a hearing in the form specified by subsection (c)(2) of this section within 30 days may result in no hearing being held and the proposed agency action being taken.

(5) (No change.)

(e) Special procedures for issuing or renewing licenses to process or store radioactive waste from other persons in accordance with §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities).

(1)-(2) (No change.)

(3) A hearing will be held only when requested, unless scheduled by the agency on its own motion. When a hearing is

requested in writing by the date stated in the notice described in paragraph (1) of this subsection, the procedures described in subsection (c)(3) and (4) of this section and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 [~~Chapter 1, §§1.21-1.34~~] of this title apply. Failure to submit a written request for a hearing in the form prescribed in subsection (c)(2) of this section on or before the stated date could result in denial of party status and in issuance or renewal of the license by the commissioner.

(A)-(H) (No change.)

(f) (No change.)

(g) Revocation of accreditation of mammography facilities.

(1) An accreditation of a mammography facility may be revoked, for any of the following:

(A)-(B) (No change.)

(C) violation of, or failure to observe any of the terms and conditions of the Act, this chapter, or order of the agency.

(2) Before the agency revokes an accreditation of mammography facility, the agency shall give notice by personal service or by certified mail, addressed to the last known address, of the facts or conduct alleged to warrant the revocation by complaint, and order the accredited mammography facility to show cause why the mammography facility accreditation should not be revoked. The accredited mammography facility shall be given an opportunity to request a hearing on the matter no later than 30 days after service [~~receipt~~] of the notice.

(3) Any accredited mammography facility against whom the agency contemplates an action described in paragraph (1) of this subsection may request a hearing by submitting a written request to [~~writing~~] the director within 30 days of service of the notice [~~or date of mailing~~].

(A)-(B) (No change.)

(h) Denial of an application for a license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification.

(1) (No change.)

(2) Any applicant, licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer against whom the agency contemplates an action described in paragraph (1) of this subsection may request a hearing by submitting a written request to [~~writing~~] the director within 30 days of service of the notice [~~or date of mailing~~].

(A)-(B) (No change.)

(i) Compliance procedures for licensees, registrants, [~~and~~] certified industrial radiographers, and other persons.

(1) A licensee, registrant, [~~or~~] certified industrial radiographer, or other person who commits a violation(s) will be issued a notice of violation.

(2) (No change.)

(3) Any license, certificate of registration, or industrial radiographer certification may be modified, suspended, or revoked in whole or in part, for any of the following:

(A)-(B) (No change.)

(C) violation of, or failure to observe any of the [~~applicable~~] terms and conditions of the Act, this chapter, or of the license, certificate of registration, or industrial radiographer certification or order of the agency.

(4)-(6) (No change.)

(7) Except in cases in which the occupational and public health, interest, or safety requires otherwise, no license, certificate of registration, or industrial radiographer certification shall be modified, suspended, or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the licensee, registrant, or certified industrial radiographer in writing, and the licensee, registrant, or certified industrial radiographer shall have been accorded an opportunity to demonstrate compliance with all lawful requirements.

(8) (No change.)

(9) Any applicant, licensee, registrant, or certified industrial radiographer against whom the agency contemplates an action described in paragraph (8) of this subsection may request a hearing by submitting a written request to [~~writing~~] the director within 30 days of service of the notice [~~or date of mailing~~].

(A)-(B) (No change.)

(j) Assessment of administrative penalties [~~Administrative Penalties~~].

(1) When the agency determines that monetary penalties are appropriate, proposals for assessment of and hearings on administrative penalties shall be made in accordance with the Act, §401.384, and applicable sections of the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 [~~Chapter 1, §§1.21-1.34~~] of this title.

(2) (No change.)

(3) Application of administrative penalties. The agency may impose differing levels of penalties for different severity level violations and different classes of users as follows.

(A) Administrative penalties may be imposed for severity level I and II violations. Administrative penalties will be considered for severity level III, IV, and V violations when they are combined with those of higher severity level(s) or for repeated violations [~~that could have been prevented by corrective action and for which the licensee, registrant, or certified industrial radiographer did not take effective corrective action~~].

(B)-(D) (No change.)

(4) (No change.)

(k) Severity levels of violations for licensees, registrants, [~~or~~] certified industrial radiographers, or other persons.

(1) Violations for licensees, registrants, [~~or~~] certified industrial radiographers, or other persons shall be categorized by one of the following severity levels.

(A)-(E) (No change.)

(2)-(4) (No change.)

(l) Impoundment of sources of radiation.

(1) (No change.)

(2) At the agency's discretion, the impounded sources of radiation may be disposed of by:

(A)-(B) (No change.)

(C) returning the source of radiation [~~registration~~] to a licensee or registrant after the emergency is over and settlement of any compliance action; or

(D) (No change.)

(3) If agency action is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If agency action is not necessary to protect the public health and safety, the agency will give written notice to the owner and/or the possessor of the impounded source of radiation of the intention to dispose of the source of radiation. Notice shall be the same as provided in subsection (i)(8) of this section. The owner or possessor shall have 30 days from the date of personal service or mailing to request a hearing under the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 [~~Chapter 1, §§1.21-1.34~~] of this title, and in accordance with subsection (i)(9) of this section, concerning the intention of the agency. If no hearing is requested within that period of time, the agency may take the contemplated action, and such action is final.

(4) Upon agency disposition of a source of radiation, the agency may notify the owner and/or possessor of any expense the agency may have incurred during the impoundment and/or disposition and request reimbursement. If the amount is not paid within 60 days from the date of notice, the agency may request the Attorney General to file suit against the owner/possessor for the amount requested. [~~If the owner/possessor desires to contest the amount of such charge, the owner/possessor may request a hearing under the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title and in accordance with subsection (i)(9) of this section.~~]

(5) (No change.)

(m) Emergency orders [~~for licenses, certificates of registration, or certified industrial radiographers~~].

(1) When an emergency exists requiring immediate action to protect the public health or safety or the environment, the agency may, without notice or hearing, issue an order citing the existence of such emergency and require that certain actions be taken as it shall direct to meet the emergency. The agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified by subsequent action of the agency. [~~These emergency orders shall apply to licenses, certificates of registration, or certified industrial radiographers.~~]

(2) In addition to the requirements of paragraph (1) of this subsection, the agency shall issue an order directing any action and corrective measure needed to remedy or neutralize the following emergency situations:

(A) (No change.)

(B) if the person [~~licensee~~] managing the byproduct material, or the operation generating the byproduct material or the radioactive waste, is unable to correct or neutralize the threat.

(3)-(4) (No change.)

(5) The agency shall use any security provided by a licensee under the Act to pay toward the costs of such actions and corrective measures taken. If the cost of actions and corrective measures require more funds than the security has provided, the agency shall request the Attorney General to seek reimbursement from the licensee or person causing the threat.

(A) (No change.)

(B) The agency may request the Attorney General to file suit for reimbursement if the agency uses security from the Radiation and Perpetual Care Account [~~Fund~~] to pay for actions or corrective measures to remedy spills or contamination by radioactive material resulting from a violation of the Act or requirements of this chapter [~~a rule~~], license, or order of the agency.

(6) The person receiving the order [~~licensee, registrant, or certified industrial radiographer~~] shall be afforded the opportunity for a hearing on an emergency order. Notice of the action, along with a complaint, shall be given to the person [~~licensee, registrant, or certified industrial radiographer~~] by personal service or certified mail, addressed to the last known address. A hearing shall be held on an emergency order if the person receiving the order submits a written request to the director [~~makes a written application to the agency for a hearing~~] within 30 days of the date of the order [~~date~~].

(A)-(C) (No change.)

(n) Miscellaneous provisions.

(1) (No change.)

(2) Interested person.

(A)-(D) (No change.)

(E) At the discretion of the ALJ [~~hearing examiner~~] an interested person may make an unsworn statement. Such statement shall not be made a part of the record.

(3) Hearing location. Hearings will be held at the [~~agency~~] offices of the State Office of Administrative Hearings in Austin unless the ALJ [~~hearing examiner~~] specifies another location.

(4) Prepared testimony. The following shall apply to written testimony of a witness:

(A) (No change.)

(B) written testimony shall be subject to objection and may be stricken by the ALJ [~~hearing examiner~~]. The witness shall be subject to cross-examination.

(5) (No change.)

(6) Non-party witness and mileage fees.

(A) (No change.)

(B) The person requesting the attendance of the witness or deponent must deposit with the agency the funds estimated by the ALJ [~~hearing examiner~~] to accrue in accordance with subparagraph (A) of this paragraph when filing a motion for the issuance of a subpoena or a commission to take a deposition.

(7) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

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CHAPTER 295. OCCUPATIONAL HEALTH

The Texas Department of Health (department) proposes the repeal of existing §§295.101-295.109, concerning occupational health rules and guidelines, and new §295.101, concerning recommended allowable concentrations of toxic gases that are being made available to the public.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 295.101 has been reviewed and the department has determined that reasons for adopting the section continue to exist in that a rule on this subject is needed; however, §295.101 needs revisions as described in this preamble and is being proposed as a new section under an amended subchapter heading. Sections 295.102-295.109 have been reviewed and the department has determined that the reasons for adopting the sections as rules no longer continue to exist.

A notice of intention to review for §§295.101-295.109 was published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 245) for the state agency review of rules in accordance with Government Code, §2001.039. No comments were received due to publication of this notice.

Existing §295.101 is being proposed for repeal and new §295.101 is being proposed in order to clarify the change in purpose of the section, remove obsolete exposure limits for hazardous substances, and provide recommended allowable concentrations of toxic gases. Sections 295.102-295.109 are being proposed for repeal because the sections were intended by the Legislature to serve only as guidance standards, and publication of such information in rules limits the department's ability to provide the most current recommended occupational health standards using the most cost effective means. Guidance standards and other occupational safety and health information will now be available to the public via the program's website or by contacting the program at the address and telephone number provided in new §295.101(d).

The proposed new title for Subchapter D, "Occupational Health Guidelines," clarifies that sections under this subchapter serve as occupational health guidelines, rather than occupational standards for places of employment. New §295.101(a) specifies that the information in the section is being provided in order to meet the requirement specified in the Health and Safety Code (HSC), §341.016(c)(1), for the department to provide the public with information on allowable concentrations of toxic gases. This subsection also clarifies that the department's authority to issue occupational standards is limited by the language in the Health and Safety Code, §341.016(c)(2), and the fact that since passage of HSC, §341.016 in 1945, the U.S. Occupational Safety and Health Administration (OSHA) has been given preemptive federal jurisdiction over occupational safety and health matters in Texas industrial establishments; i.e., in the private sector. Therefore, the information provided in the section is being provided as public information, rather than enforceable standards. New §295.101(b) provides information on how the department derived the List of Toxic Gases and Recommended Allowable Concentrations. Section 295.101(b) clarifies that the List of Toxic Gases includes only those gases that meet the OSHA Hazard Communication Standard's (29 Code of Federal Regulations, §1910.1200, Appendix A) definitions of "toxic" or "highly toxic" by inhalation. New §295.101(b) also clarifies that the toxic gases are identified by both chemical name and Chemical Abstract Service (CAS) Number and the Recommended Allowable Concentrations (RAC) for each gas was derived from the OSHA Permissible Exposure Limit for that substance, provided in both parts per million (ppm) and milligrams per cubic meter (mg/M^3) of air, as appropriate. New §295.101(c) provides the List of Toxic Gases and RACs. New §295.101(d) provides a program mailing address and telephone number in order to ensure public access to the program's information.

Elias Briseno, Director, General Sanitation Division, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of administering the sections as proposed.

Mr. Briseno has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be increased public awareness of toxic gases and recommended allowable concentrations. There will be no costs to micro-businesses or small businesses to comply with the section as proposed since the rules are intended to serve only as guidelines. There are no anticipated economic costs to persons who are required to comply with the repeals and new section as proposed since the allowable concentrations of toxic gases proposed in new §295.101 are not enforceable by the department. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Elias Briseno, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6635, extension 2303, fax (512) 834-6707. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Wednesday, September 3, 2003, at the Texas Department of Health, Room M-653, 1100 West 49th Street, Austin, Texas.

SUBCHAPTER D. OCCUPATIONAL HEALTH RULES AND GUIDELINES

25 TAC §§295.101 - 295.109

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Health and Safety Code, §341.002, which provides the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapter 341; §341.016(c)(1), which requires the department to make available to the state's citizens information concerning allowable concentrations of toxic gases; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 341. The review of the existing sections implements Government Code, §2001.039.

§295.101. Threshold Limit Values of Airborne Contaminants.
§295.102. Exposure to Toxic and Hazardous Substances.
§295.103. Occupational Noise Exposure.
§295.104. Respiratory Protection.
§295.105. Ventilation.
§295.106. Environmental Standards in Industrial Establishments.
§295.107. Sanitation in the Workplace.
§295.108. Access to Employee Exposure and Medical Records.
§295.109. Medical Services and First Aid.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304856
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 458-7236

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SUBCHAPTER D. OCCUPATIONAL HEALTH GUIDELINES

25 TAC §295.101

The new section is proposed under the Health and Safety Code, §341.002, which provides the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapter 341; §341.016(c)(1), which requires the department to make available to the state's citizens information concerning allowable concentrations of toxic gases; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new section affects the Health and Safety Code, Chapter 341. The review of the existing sections being repealed into this new section implements Government Code, §2001.039.

§295.101. Recommended Allowable Concentrations of Toxic Gases.

(a) Purpose. The authority for these rules is granted to the Texas Department of Health (department) in the Health and Safety Code, §341.002. The purpose of this section is to provide the public with information on recommended allowable concentrations of toxic gases, as specified in the Health and Safety Code (HSC), §341.016(c)(1). Since HSC, §341.016, only provides the department with authority for developing occupational and sanitation standards for industrial establishments, and since the department's authority over industrial establishments is preempted by the U.S. Occupational Safety and Health Administration (OSHA), the department is issuing the List of Toxic Gases and Recommended Allowable Concentrations only as a guideline.

(b) Information sources. In developing the List of Toxic Gases and Recommended Allowable Concentrations (RACs) for this section, the department used the following information and criteria.

(1) The List of Toxic Gases was derived from those gases appearing in Table Z-1, "Limits for Air Contaminants," published by the U.S. Occupational Safety and Health Administration (OSHA) in 29 Code of Federal Regulations (CFR), §1910.1000. Only those gases that had a Median Lethal Concentration (LC(50)) in air of more than 200 parts per million (ppm) were selected for inclusion on the List of Toxic Gases. The department used the LC(50) criterion to ensure that only those gases that met the definition of "highly toxic" or "toxic," as those terms are defined in OSHA's Hazard Communication Standard, 29 CFR, §1910.1200, Appendix A, would be included on the List of Toxic Gases.

(2) In order to ensure a unique identity for each toxic gas and provide the public with information that could be used to match chemical name synonyms to a specific listed gas, both the chemical name and the corresponding Chemical Abstract Service Number (CAS#) are referenced in the List of Toxic Gases.

(3) The Recommended Allowable Concentration (RAC) for each toxic gas was derived from its corresponding Table Z-1 Permissible Exposure Limit (PEL) concentration established by OSHA. As appropriate, the RAC is provided in both ppm in air and milligrams per cubic meter (mg/M^3).

(c) Adopted List of Toxic Gases and Recommended Allowable Concentrations.
Figure: 25 TAC §295.101(c)

(d) Responsibility for implementation of program. The department's responsibilities under this section are carried out through its General Sanitation Division. Routine inquiries regarding this section and requests for additional guidance related to occupational health and safety should be addressed to: Texas Department of Health, General Sanitation Division, 1100 West 49th Street, Austin, Texas 78756, or telephone number (512) 834-6635.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER E. INDUSTRIAL HOMEWORK STANDARDS

25 TAC §§295.121 - 295.126

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Health (department) proposes the repeal of existing §§295.121-295.126, concerning industrial homework standards.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 295.121-295.126 have been reviewed, and the department has determined that reasons for adopting the sections no longer continue to exist.

A notice of intention to review for §§295.121-295.126 was published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 245) for the state agency review of rules in accordance with Government Code, §2001.039. No comments were received due to publication of this notice.

Existing §§295.121-295.126 are being proposed for repeal in order to remove unnecessary language and delete an obsolete reference to a program created in 1937 when industrial homeworkers were commonly used to manufacture articles for employers. The existing rules contain language that is redundant with language in the Health and Safety Code (HSC), Chapter 143, the Industrial Homework Act, and is being proposed for repeal in order to remove unnecessary rules.

Elias Briseno, Director, General Sanitation Division, has determined that for each year of the first five years the sections are in

effect, there will be no fiscal implications to state or local government as a result of repealing the sections as proposed.

Mr. Briseno has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of the repeals will be elimination of unnecessary rules. There will be no costs to micro-businesses or small businesses as a result of repealing the sections because all of the requirements for compliance with HSC, Chapter 143, are included in the language of the statute. There are no anticipated economic costs to persons as a result of repealing the sections. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Elias Briseno, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6635, extension 2303, fax (512) 834-6707. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeals are proposed under HSC, §143.010, which provides the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapter 143; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect HSC, Chapter 143. The review of the rules implements Government Code, §2001.039.

§295.121. Scope and Purpose.

§295.122. Definitions.

§295.123. General Requirements.

§295.124. Employer's Permit.

§295.125. Homeworker's Certificate.

§295.126. Forms.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 295. OCCUPATIONAL HEALTH

The Texas Department of Health (department) proposes the repeal of existing §§295.141-295.148, concerning standards for face and eye protection in public schools, and new §§295.141-295.143, concerning guidelines for selection and use of face and eye protection in public schools.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 295.141-295.148 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that guidelines on this subject are needed. However, §§295.141-295.148 need revisions as described in this preamble and are being repealed and proposed as new §§295.141-295.143.

A notice of intention to review for §§295.141-295.148 was published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 245) for the state agency review of rules in accordance with Government Code, §2001.039. No comments were received due to publication of this notice.

Existing §§295.141-295.148 are being proposed for repeal in order to clarify the change in applicability of the sections, remove obsolete standards and guidelines for face and eye protection, remove manufacturing and design standards that are not applicable to the purchasers of face and eye protection equipment, and facilitate adoption by reference of current and amended federal standards as guidelines for selection and use of face and eye protection.

The proposed amended title for Subchapter F, "Guidelines for Selection and Use of Face and Eye Protection in Public Schools," clarifies that the sections under this subchapter are intended to serve as recommended guidelines for performing hazard assessments and making choices regarding the appropriate types of face and eye protection needed for certain activities in public schools, rather than serving as standards for the design and manufacture of face and eye protective equipment. New §295.141 clarifies that the rules are issued as health protection guidelines for selection and use of face and eye protection in public schools under the Health and Safety Code, §341.002(2), and are applicable to employees, students, and visitors who participate in certain educational activities and programs that pose a high risk for face or eye injuries. New §295.142 proposes to adopt by reference, as guidelines only, the standards for selection and use of eye and face personal protective equipment established by the U.S. Occupational Safety and Health Administration (OSHA), and to adopt as a guideline, as amended, an OSHA reference document that assists employers in selecting eye and face protection based on workplace hazard assessments. New §295.143 provides a program mailing address and telephone number in order to ensure public access to the referenced documents and other program information.

Elias Briseno, Director, General Sanitation Division, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of administering the sections as proposed.

Mr. Briseno has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be a decrease in the number of face and eye injuries experienced by staff, students, and visitors participating in science laboratories or in vocational, art, industrial arts or science courses in public schools. There will be no costs to micro-businesses or small businesses to comply with the sections as proposed since the proposed amendments are only applicable to public schools. There are no anticipated economic costs to persons who choose to comply with the sections as proposed because the existing rules that are being proposed for repeal also instructed public schools to provide face and eye protection for the covered activities. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Elias Briseno, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6635, extension 2303, fax (512) 834-6707. Comments will be accepted for

30 days following publication of this proposal in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Friday, September 5, 2003, at the Texas Department of Health, Room M-653, 1100 West 49th Street, Austin, Texas.

SUBCHAPTER F. STANDARDS FOR FACE AND EYE PROTECTION IN PUBLIC SCHOOLS

25 TAC §§295.141 - 295.148

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Health and Safety Code, §341.002(2), which provides the Texas Board of Health (board) with the authority to establish standards and procedures for health protection measures; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 341. The review of the rules implements Government Code, §2001.039.

§295.141. Purpose and Scope.
§295.142. Exceptions.
§295.143. Definitions.
§295.144. General Requirements.
§295.145. Eye Protectors.
§295.146. Materials and Methods of Test of Protections.
§295.147. Selection of Eye and Face Protective Devices.
§295.148. Appendix for §295.146.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200304862
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER F. GUIDELINES FOR SELECTION AND USE OF FACE AND EYE PROTECTION IN PUBLIC SCHOOLS

25 TAC §§295.141 - 295.143

The new rules are proposed under the Health and Safety Code, §341.002(2), which provides the Texas Board of Health (board) with the authority to establish standards and procedures for health protection measures; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new rules affect the Health and Safety Code, Chapter 341. The review of the rules implements Government Code, §2001.039.

§295.141. Purpose and Scope.

(a) Purpose. The authority for these guidelines is granted to the Texas Department of Health (department) in the Health and Safety Code, §341.002. The purpose of this section is to provide governing boards and administrators of Texas school districts with recommended guidelines on the selection and use of face and eye protection necessary to protect the health of employees, students, and visitors when such individuals are exposed to certain hazardous environments in schools.

(b) Scope. The guidelines in these sections are applicable to all staff members, students, and visitors within Texas public schools participating in educational activities and programs that involve:

(1) the use of hazardous chemicals;

(2) the use of hot liquids or solids;

(3) the use of molten materials;

(4) performing grinding, chipping, or other hazardous activities where there is danger of flying particles;

(5) milling, sawing, turning, shaping, cutting, or stamping of any solid materials;

(6) heat treatment, tempering, or kiln firing of any metal or other materials;

(7) cutting, welding, or brazing operations;

(8) the use of hazardous radiation, including the use of infrared and ultraviolet light or lasers;

(9) repair or servicing of any vehicle; or

(10) any process or activity in a vocational, art, industrial arts or science course or laboratory that might have a tendency to cause damage to the eyes.

§295.142. Guidelines for Selection and Use of Eye and Face Protective Devices.

(a) The following section in the Code of Federal Regulations (CFR) is adopted by reference by the Texas Department of Health (department) as a recommended guideline for selection and use of face and eye protection in public schools: 29 CFR, Part 1910, Subpart I, §1910.133, titled "Eye and Face Protection," effective May 2, 1996, as amended.

(b) The following section in the CFR is adopted by reference by the department as a recommended guideline for hazard assessment and face and eye protective equipment selection in public schools: 29 CFR, Part 1910, Subpart I, Appendix B, titled, "Non-mandatory Compliance Guidelines for Hazard Assessment and Personal Protective Equipment Selection," effective April 6, 1994, as amended.

§295.143. Responsibility for Implementation of Program.

The responsibilities under this section are carried out through the Texas Department of Health, General Sanitation Division. Printed or electronic copies of the documents referenced in §295.142 of this title (relating to Guidelines for Selection and Use of Eye and Face Protective Devices) may be obtained free of charge by contacting the division. Routine inquiries regarding §§295.141-295.142 of this title, and requests for additional guidance related to face and eye safety should be addressed to: Texas Department of Health, General Sanitation Division, 1100 West 49th Street, Austin, Texas 78756, telephone number (512) 834-6635.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. AGENTS' LICENSING

The Texas Department of Insurance proposes amending §§19.603, 19.802, and 19.1002, and adopting new §§19.701-19.712 concerning public insurance adjusters. The proposed amendments and new sections are necessary to implement the public insurance adjuster license type added by the enactment of Insurance Code Article 21.07-5 by Senate Bill 127, 78th Legislature. The department has proposed for repeal existing §§19.701 - 19.709 elsewhere in this issue of the Texas Register.

The proposed sections are necessary to implement Article 21.07-5 and provide effective regulation of public insurance adjusters. Senate Bill 127 added, for the first time, licensing requirements for public insurance adjusters and a structure to regulate the activities of such adjusters, who are defined in the law as those persons who, for direct, indirect or other compensation, take certain actions, including negotiating or settling claims on behalf of insureds for loss or damage under policies of insurance covering real or personal property. The proposed sections provide further guidance to enhance the requirements of Article 21.07-5, consistent with the new law's public protection goals, by establishing requirements for: registering public insurance adjuster trainees and licensing resident and nonresident corporations, partnerships, and individuals; maintaining and demonstrating financial responsibility; setting license and certificate fees; completing continuing education; reporting criminal history and providing fingerprints; prescribing contract terms; and defining the term "advertisement" as used in Article 21.07-5.

The proposed amendments to §19.603 remove an obsolete reference to public insurance adjusters and update references to the department. Proposed §19.701 references definitions of terms used in the proposed new subchapter. Proposed §19.702 establishes the type of public insurance adjuster license. Proposed §19.703 establishes the criteria for registering and renewing temporary training certificates. Proposed §19.704 references statutory licensing criteria for individuals and establishes the criteria for licensing corporations and partnerships as public insurance adjusters.

Proposed §19.705 establishes the financial responsibility requirement for public insurance adjusters. The requirement is based on the perils that the financial responsibility must cover under Article 21.07-5, other Insurance Code financial responsibility requirements, and the type and amount of financial responsibility required in other states that license public insurance adjusters. Proposed §19.706 establishes financial responsibility reporting requirements for public insurance adjusters. Proposed §19.707 establishes the acceptable type of financial responsibility. These two proposed sections are based on the department's current procedures and requirements for other license types that maintain financial responsibility through surety bonds.

Proposed §19.708 establishes public insurance adjuster contract requirements. Proposed §19.709 establishes criminal history filing requirements for nonresident public insurance adjuster applicants and clarifies the timing of the annual nonresident affidavit. Proposed §19.710 establishes criminal history filing requirements for nonresident persons required to file biographical information under §19.704. Proposed §19.711 establishes fingerprint requirements for public insurance adjuster applicants. Proposed §19.712 defines the term "advertisement."

The proposed amendments to §19.802 (b)(20) and (21) establish licensing and renewal fees for public insurance adjusters and temporary certificate holders. The proposed amendment to §19.1002 (16) incorporates public insurance adjusters into the department's existing licensee continuing education program.

The department will consider the adoption of the proposed amendments to §§19.603, 19.802, 19.1002, and new 19.701-19.712 in a public hearing under Docket No. 2557 on September 18, 2003 at 10:30 a.m. in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe, Austin, Texas.

Matt Ray, deputy commissioner, licensing division, has determined that for the first five years the proposed sections will be in effect, there will be an increase in revenue to state government in the approximate amount of $67,500 annually as a result of the enforcement and administration of these rules due to the initial licensing and biennial license renewal of public insurance adjusters. Based on an average of licensed adjusters to public insurance adjusters in other states that have both license types, Mr. Ray anticipates that approximately 1,250 biennial public insurance adjuster licenses will be issued during each of the first two years this proposal is in effect with an application fee of $50 generating $62,500 in annual revenue. During the third through fifth year the license type is in effect, Mr. Ray anticipates that the number of original licenses issued by the department will fall to approximately 500 annually and that renewals will be approximately 750 annually. This will result in an estimated 1,250 licenses being issued or renewed annually and generating $62,500 in annual revenue. Mr. Ray further anticipates that the department will annually issue and renew 100 temporary training certificates during each year of the first five years this proposal is in effect with an application and renewal fee of $50 generating $5,000 in annual revenue. As required by the Texas OnLine Project, a $3 Texas OnLine subscription fee has been included in the proposed renewal fee, which the department will transfer to the Texas OnLine Authority for each license renewed. Mr. Ray has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to local governments as a result of the enforcement or administration of these rules. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Ray has determined that for each year of the first five years the proposed sections are in effect, the anticipated public benefit as a result of adopting and administering the sections will be the effective regulation of public insurance adjusters and protection of persons who contract with a public insurance adjuster. The anticipated public benefit of the licensing fees assessed in the proposed rule will be the sufficient coverage of department administration costs, which include licensure, enforcement of statutory and rule requirements, disciplinary actions, and market conduct

examinations, among other regulatory protections. The anticipated public benefit of the Texas Online Subscription fees placed on each renewal will be increased access to state government over the internet for the public and licensees. The anticipated public benefit of maintaining financial responsibility is to provide consumers with a potential source of recovery for a public insurance adjuster's malfeasance, error or omission. The anticipated public benefit of requiring fingerprint and criminal history information is that the department will be able to more effectively evaluate a person's fitness for licensure or to be involved in the management or control of a licensee.

The probable economic cost to persons required to comply with these sections will be application and renewal fees for licenses and training certificates, costs of maintaining and demonstrating financial responsibility, and costs related to producing fingerprints and criminal history information.

The probable economic costs to comply with the proposed sections establishing original application, registration, renewal, and examination fees result from the legislative enactment of Insurance Code Article 21.07-5 and its requirement that the department adopt fees sufficient to cover the cost of license administration. Following adoption, the cost for each separate public insurance adjuster license and each temporary training certificate would be $50 per original application in each year of the first five years the sections are in effect. The cost of renewing each public insurance adjuster license would be $50 per biennial renewal. The cost of renewing each temporary training certificate would be $50. A portion, $3, of the license renewal fee results from Government Code Sec. 2054.252, concerning the Texas Online Project, and not the adoption, enforcement, or administration of the proposed sections. The cost of each department-administered public insurance adjuster examination or reexamination would be $50, except where the department contracts with a designated testing service to administer examinations, in which case the fee shall be the amount authorized to be charged pursuant to the department's agreement with the testing contractor.

The probable economic costs to comply with the proposed sections establishing financial responsibility requirements result from the legislative requirements of Insurance Code Article 21.07-5 that directs the department to determine the amount and type of financial responsibility that will cover all of the perils set forth in Article 21.07-5 §6. The department's bond section estimates that the annual cost of a surety bond described in the proposal is 2% of the total bond amount, which is $200 for a $10,000 surety bond. The probable economic costs to comply with the proposed sections establishing fingerprint and criminal history reporting requirements result from the legislative requirements in Insurance Code Article 21.07-5 that require the department to determine that the applicant is trustworthy and has not been convicted of a felony. Fingerprint cards are available from the department at no charge. The department estimates the fee for completion of the cards by a local law enforcement agency to be $10. Further, the department's testing contractor will make a set of fingerprints for an applicant at a testing center for the sum of $17.50. The department estimates that a nonresident may obtain a copy of his criminal history report for a fee less than $20.

There is no difference in the costs of compliance between a large and small business as a result of the proposed sections as the costs set forth in these proposed sections, with the exception of nonresident criminal history information, apply equally to each licensee.

In addition, the cost of labor per hour is not affected by the proposed sections and thus there is no disproportionate economic impact on small or micro-businesses. Further, it is anticipated that substantially all, if not all, persons affected by the probable economic costs of complying with this rule will be small businesses or micro-businesses. It is neither legal nor feasible to waive the requirements of the sections for small or micro-businesses because doing so would eliminate substantially all of the public benefits of licensing public insurance adjusters under Article 21.07-5.

To be considered, written comments on the proposal must be submitted no later than 5 p.m. on September 22, 2003 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

SUBCHAPTER G. LICENSING OF INSURANCE ADJUSTERS

28 TAC §19.603

These sections are proposed under Insurance Code Articles 21.01, 21.01-1, 21.01-2, and 21.07-5, and §§36.001 and 801.056, and Government Code §2054.252. Article 21.01 §3 provides that Insurance Code Chapter 21, Subchapter A applies to the listed licensees and §4 authorizes the commissioner to adopt rules to implement the subchapter. Article 21.01-1 §1 authorizes the commissioner to require applicants to take examinations through a department-designated vendor. Article 21.01-1 §3 authorizes the commissioner to develop a continuing education program for licensees. Article 21.01-2 §3A authorizes the commissioner to refuse, deny, revoke or suspend a license or license application. Article 21.07-5 §29 authorizes the department to adopt rules necessary to implement Article 21.07-5 and define the term advertisement. Insurance Code §801.056 authorizes the commissioner to require applicants to submit a complete set of fingerprints prior to licensure. Government Code §2054.252 (g) requires the department to increase licensing fees in an amount sufficient to cover the Texas OnLine Authority subscription fee cost. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by the proposal: Rule No. Statute Insurance Code Articles 21.07-5, 21.01, 21.01-1, 21.01-1 and 21.07-5 21.01, 21.01-1, and 21.07-5 §19.803 Government Code §2054.252

§19.603. Interpretations of the Act.

(a) (No change.)

[~~(b) Public adjusters are not subject to licensing under the Act, as they do not regularly investigate, adjust, or supervise losses on behalf of an insurer or a self-insured.~~]

(b) [~~(c)~~] Marine surveyors, as usually and customarily defined, are not subject to licensing under the Act, unless they regularly investigate, adjust, or supervise losses on behalf of an insurer or self-insured.

(c) [~~(d)~~] The department [~~State Board of Insurance~~] recognizes that certain risks are commonly referred to as "self-insured" or

"self-handlers" in reference to insurance claims and losses. For the purposes of administration of the Act and in reference to those entities operating as such, the department [~~State Board of Insurance~~] interprets that any individual specifically employed for the purpose of supervision, investigation, or adjusting of losses is subject to the provisions of the Act, and the individual or individuals who have the primary responsibility for the supervision, investigation, or adjustment of losses is subject to the provisions of the Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304978
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-6327

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SUBCHAPTER H. LICENSING OF PUBLIC INSURANCE ADJUSTERS

28 TAC §§19.701 - 19.712

These sections are proposed under Insurance Code Articles 21.01, 21.01-1, 21.01-2, and 21.07-5, and §§36.001 and 801.056, and Government Code §2054.252. Article 21.01 §3 provides that Insurance Code Chapter 21, Subchapter A applies to the listed licensees and §4 authorizes the commissioner to adopt rules to implement the subchapter. Article 21.01-1 §1 authorizes the commissioner to require applicants to take examinations through a department-designated vendor. Article 21.01-1 §3 authorizes the commissioner to develop a continuing education program for licensees. Article 21.01-2 §3A authorizes the commissioner to refuse, deny, revoke or suspend a license or license application. Article 21.07-5 §29 authorizes the department to adopt rules necessary to implement Article 21.07-5 and define the term advertisement. Insurance Code §801.056 authorizes the commissioner to require applicants to submit a complete set of fingerprints prior to licensure. Government Code §2054.252 (g) requires the department to increase licensing fees in an amount sufficient to cover the Texas OnLine Authority subscription fee cost. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by the proposal: Rule No. Statute Insurance Code Articles 21.07-5, 21.01, 21.01-1, 21.01-1 and 21.07-5 21.01, 21.01-1, and 21.07-5 §19.803 Government Code §2054.252

§19.701. Definitions.

(a) Words and terms defined in Insurance Code Article 21.07 §1A shall have the same meaning when used in this subchapter.

(b) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Corporation--A legal entity that is organized under the business corporations laws or limited liability company laws of this state, another state, or a territory of the United States. The licensing and regulation of a limited liability company is subject to all provisions of this subchapter that apply to a corporation licensed under this subchapter.

(2) Partnership--An association of two or more persons organized under the partnership laws or limited liability partnership laws of this state, another state, or a territory of the United States. The term includes a general partnership, limited partnership, limited liability partnership, and limited liability limited partnership.

(3) Public Insurance Adjuster--A person licensed under Insurance Code Article 21.07-5 §§5, 5A, 15 or 15A or §19.704 of this subchapter (relating to Public Insurance Adjuster Licensing).

§19.702. Type of Public Insurance Adjuster Licenses.

The department shall issue a single public insurance adjuster license pursuant to Insurance Code Article 21.07-5 and the provisions of this subchapter.

§19.703. Temporary Training Certificates.

(a) A temporary training certificate applicant must file with the department a fully completed application, on a form as required by the commissioner, that is accompanied by the temporary certificate application fee, proof of financial responsibility and any other information the commissioner deems necessary.

(b) An individual may not hold more than two 180-day temporary training certificates, including renewals, during an 18 month period.

(c) Except as prohibited in subsection (b) of this section, an individual may renew a temporary training certificate by filing with the department 30 days prior to the expiration of an existing temporary training certificate a fully completed application, on a form as required by the commissioner, that is accompanied by the temporary certificate renewal fee, proof of financial responsibility and any other information the commissioner deems necessary.

§19.704. Public Insurance Adjuster Licensing.

(a) Any individual that desires a public insurance adjuster license must file with the department a fully completed license application, on a form as required by the commissioner, and otherwise meet the licensing qualification requirements of Insurance Code Article 21.07-5 §§5 or 15 and this subchapter.

(b) Any corporation or partnership that desires a public insurance adjuster license must file with the department a fully completed license application on a form as required by the commissioner.

(c) The department shall issue a license to a resident or nonresident corporation or partnership if the department finds that:

(1) the corporation or partnership is:

(A) organized under the laws of this state or any other state or territory of the United States;

(B) admitted to conduct business in this state by the secretary of state, if required; and

(C) authorized by its articles of incorporation or its partnership agreement to act as a public insurance adjuster;

(2) the corporation or partnership meets the definition of that entity adopted under Insurance Code Article 21.07 §1A;

(3) at least one officer of the corporation or one active partner of the partnership and all other persons performing any acts of a public insurance adjuster on behalf of the corporation or partnership in this state are individually licensed by the department separately from the corporation or partnership;

(4) the corporation or partnership intends to be actively engaged in the business of public insurance adjusting;

(5) the corporation or partnership has filed a separate registration with the department for each location from which it will conduct business as a public insurance adjuster;

(6) the corporation or partnership has submitted the application, appropriate fees, proof of financial responsibility, and any other information required by the department;

(7) each officer, director, member, manager, partner, or any other person who has the right or ability to control the license holder meets the qualifications for licensure set forth in Insurance Code Article 21.07-5 §§5 and 15; and

(8) no officer, director, member, manager, partner, or any other person who has the right or ability to control the license holder has:

(A) had a license suspended or revoked or been the subject of any other disciplinary action by a financial or insurance regulator of this state, another state, or the United States;

(B) committed an act for which a license may be denied under Insurance Code Article 21.01-2 or 21.07-5.

(d) Nothing contained in this section shall be construed to permit any unlicensed employee or representative of any corporation or partnership to perform any act of a public insurance adjuster without obtaining a public insurance adjuster license.

(e) Each corporation or partnership applying for a public insurance adjuster license shall file, under oath, on a form developed by the department, biographical information for each of its executive officers and directors or unlicensed partners who administer the entity's operations in this state, and shareholders who are in control of the corporation, or any other partners who have the right or ability to control the partnership. If any corporation or partnership is owned, in whole or in part, by another entity, a biographical form is required for each individual who is in control of the parent entity.

(f) Each corporation or partnership shall notify the department not later than the 30th day after the date of:

(1) a felony conviction of a licensed public insurance adjuster of the entity or any individual associated with the corporation or partnership who is required to file biographical information with the department;

(2) an event that would require notification under Insurance Code §81.003; and

(3) the addition or removal of an officer, director, partner, member, or manager.

(g) A person may not acquire in any manner any ownership interest in an entity licensed as a public insurance adjuster under this subchapter if the person is, or after the acquisition would be directly or indirectly in control of the license holder, or otherwise acquire control of or exercise any control over the license holder, unless the person has filed the following information with the department under oath:

(1) a biographical form for each person by whom or on whose behalf the acquisition of control is to be effected;

(2) a statement certifying that no person who is acquiring an ownership interest in or control of the license holder has been the subject of a disciplinary action taken by a financial or insurance regulator of this state, another state, or the United States;

(3) a statement certifying that, immediately on the change of control, the license holder will be able to satisfy the requirements for the issuance of the public insurance adjuster license; and

(4) any additional information that the commissioner may prescribe as necessary or appropriate to the protection of the insurance consumers of this state or as in the public interest.

(h) If a person required to file a statement under subsection (g) of this section is a partnership, limited partnership, syndicate, or other group, the commissioner may require that the information required by paragraphs (1)-(4) of that subsection for an individual be provided regarding each partner of the partnership or limited partnership, each member of the syndicate or group, and each person who controls the partner or member. If the partner, member, or person is a corporation or the person required to file the statement under subsection (g) of this section is a corporation, the commissioner may require that the information required by paragraphs (1)-(4) of that subsection be provided regarding:

(1) the corporation;

(2) each individual who is an executive officer or director of the corporation; and

(3) each person who is directly or indirectly the beneficial owner of more than 10 percent of the outstanding voting securities of the corporation.

(i) The department may disapprove an acquisition of control if, after notice and opportunity for hearing, the commissioner determines that:

(1) immediately on the change of control the license holder would not be able to satisfy the requirements for the public insurance adjuster license;

(2) the competence, trustworthiness, experience, and integrity of the persons who would control the operation of the license holder are such that it would not be in the interest of the insurance consumers of this state to permit the acquisition of control; or

(3) the acquisition of control would violate the Insurance Code or another law of this state, another state, or the United States.

(j) Notwithstanding subsection (h) of this section, a change in control is considered approved if the department has not proposed to deny the requested change before the 61st day after the date the department receives all information required by this section.

(k) The commissioner is the corporation's or partnership's agent for service of process in the manner provided by Insurance Code Chapter 804 in a legal proceeding against the corporation or partnership if:

(1) the corporation or partnership licensed to transact business in this state fails to appoint or maintain an agent for service in this state;

(2) an agent for service cannot with reasonable diligence be found; or

(3) the license of a corporation or partnership is revoked.

(l) If a license holder does not maintain the qualifications necessary to obtain the license, the department shall revoke or suspend the license or deny the renewal of the license under Insurance Code Article 21.01-2 or 21.07-5.

(m) Each public insurance adjuster shall maintain all insurance records, including all records relating to customer complaints received from customers and the department, separate from the records of any

other business in which the person may be engaged and in the manner specified in Insurance Code Article 21.07-5.

(n) The department may license a depository institution or entity chartered by the federal Farm Credit Administration under the farm credit system established under 12 U.S.C. Section 2001 et seq., as amended, to act as a public insurance adjuster in the manner provided for the licensing of a corporation under this section.

§19.705. Financial Responsibility Requirement.

(a) Each public insurance adjuster, as a condition for being licensed, and each trainee as a condition for receiving a temporary training certificate and as a condition for continuing the license or training certificate in force, must maintain proof of financial responsibility by obtaining a surety bond in the principal sum of not less than $10,000 that covers all the required perils and losses set forth under Insurance Code Article 21.07-5 §6.

(b) Each public insurance adjuster and trainee must obtain separate proof of financial responsibility and may not rely on the bond of any other public insurance adjuster or trainee to demonstrate proof of financial responsibility.

§19.706. Demonstrating Financial Responsibility.

The public insurance adjuster applicant, licensee, or trainee shall demonstrate proof of financial responsibility by providing to the department the original surety bond upon application, renewal, or replacement of the bond.

§19.707. Type of Financial Responsibility.

A surety bond used to maintain and demonstrate proof of financial responsibility under §§19.705 and 19.706 of this subchapter (relating to Financial Responsibility Requirement and Demonstrating Financial Responsibility) must:

(1) be in the form specified by the department;

(2) be executed by the public insurance adjuster as principal and a surety company authorized to do business in this state as surety;

(3) be payable to the Texas Department of Insurance for the use and benefit of an insured, conditioned that the public insurance adjuster shall pay any final judgment recovered against it by an insured;

(4) provide that the surety will give no less than 30 days written notice of bond termination to the licensee and the department;

(5) be separate from any other financial responsibility obligation; and

(6) not be used to demonstrate professional responsibility for any other license, certification, or person.

§19.708. Public Insurance Adjuster Contracts.

(a) A public insurance adjuster may not, directly or indirectly, act within this state as a public insurance adjuster without having first entered into a written contract executed in duplicate by the licensee and the insured or the insured's duly authorized representative.

(b) A public insurance adjuster's written contract with an insured must contain:

(1) the name, address, and license number of the public insurance adjuster negotiating the contract and, if applicable, the name, address, and license number of the public insurance adjuster's employing public insurance adjuster;

(2) the public insurance adjuster's telephone and fax number, including area code;

(3) the mailing and physical addresses to which notice of cancellation and all communications to the public insurance adjuster may be delivered;

(4) if any part of the contract or solicitation is made via the internet, the e-mail and website address to which notice of contract cancellation and all communications to the public insurance adjuster may be delivered;

(5) the date and time the contract was signed;

(6) for each nonresident public insurance adjuster named in the contract, the name and address of the nonresident public insurance adjuster's agent for service of process;

(7) the following separate statements in 12 point bold faced type on the signature page of the contract:

(A) "NOTICE: THE INSURED MAY CANCEL THIS CONTRACT WITHIN 72 HOURS OF SIGNATURE FOR ANY REASON.";

(B) "WE REPRESENT THE INSURED ONLY." and;

(C) "YOU ARE ENTERING INTO A SERVICE CONTRACT. YOU ARE BEING CHARGED A FEE FOR THIS SERVICE. YOU DO NOT HAVE TO ENTER INTO THIS CONTRACT TO MAKE A CLAIM FOR LOSS OR DAMAGE ON A POLICY OF INSURANCE.";

(8) the statement: "If the insurance carrier pays or commits in writing to pay to the insured the policy limits of the insurance policy in accordance with Insurance Code Article 6.13 or §862.053 within 72 hours of the loss being reported to the insurer, the public insurance adjuster is not entitled to compensation based on a percentage of the insurance settlement, but is entitled to reasonable compensation for the public insurance adjuster's time and expenses provided to the insured before the claim was paid or the written commitment to pay was received.";

(9) the statement: "NOTICE: A public insurance adjuster may not participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the public insurance adjuster or engage in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, or having a financial interest in, any salvage firm, repair firm, or other firm that obtains business in connection with any claim the public insurance adjuster has a contract or agreement to adjust.";

(10) on the first or second page of the contract, the following English and Spanish notices in 10 point bold faced type:

(A) "IMPORTANT NOTICE: You may contact the Texas Department of Insurance to obtain information on public insurance adjusters, your rights and complaints at: 1-800-252-3439 or you may write the Texas Department of Insurance at P. O. Box 149104, Austin, Texas 78714-9104, Fax # (512) 475-1771.";

(B) "ADVISO IMPORTANTE: Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acera ajustores publicos de seguros, o sus derechos o quejas al: 1-800-252-3439 o puede escribir al Departamento de Seguros de Texas P. O. Box 149104, Austin, Texas 78714-9104, Fax # (512) 475-1771."; and

(11) a clear statement of the public insurance adjuster's commission including:

(A) the method of calculating compensation for the public insurance adjuster, either hourly, flat fee, or percentage of settlement; and

(B) a statement that under any method of compensation the total commission payable to the public insurance adjuster may not exceed 10% of the amount of the insurance settlement.

(c) The contract may not contain any terms or conditions which have the effect of limiting or nullifying any requirements of the Insurance Code, this subchapter, or other rules of the department.

§19.709. Nonresident Applicants and License Holders.

(a) An applicant for a nonresident public insurance adjuster license or temporary certificate must, through the law enforcement agency of the applicant's state of residence, submit a copy of the applicant's criminal history records to the department. The department shall use the criminal history records to determine eligibility for issuance of a license in accordance with this subchapter and other laws of this state.

(b) The annual nonresident affidavit required by Insurance Code Article 21.07-5 §15(d) shall be made on a form available from the department and filed one year after the date the license was issued and annually thereafter.

§19.710. Nonresidents Required to File Biographical Information.

A nonresident who is required to file biographical information under §19.704 of this subchapter (relating to Public Insurance Adjuster Licensing) shall, through the law enforcement agency of the person's state of residence, submit a copy of the applicant's criminal history records to the department. The department shall use the criminal history records to determine eligibility for issuance of a license in accordance with this subchapter and other laws of this state.

§19.711. Fingerprint Requirement.

(a) Any individual who submits to the department a new application to be licensed or registered under Insurance Code Article 21.07-5 and any individual from whom biographical information is required under §19.704 of this subchapter (relating to Public Insurance Adjuster Licensing) shall attach to the application or biographical information a completed, legible fingerprint card.

(b) Fingerprints obtained under this section shall be handled in the manner set forth in §19.1807 of this chapter (relating to Confidentiality and Custody of Fingerprint Cards).

§19.712. Advertisement.

(a) As used in Insurance Code Article 21.07-5, "advertisement" includes:

(1) printed and published material, audio visual material and descriptive literature of a public insurance adjuster used in direct mail, newspapers, magazines, radio, telephone and television scripts, internet web sites, billboards, and similar displays;

(2) descriptive literature and promotional aids of all kinds issued by a public insurance adjuster for presentation to members of the public, including circulars, leaflets, booklets, depictions, illustrations, and form letters;

(3) prepared promotional talks, presentations and materials for use by a public insurance adjuster, and those representations made on a recurring basis by a public insurance adjuster to members of the public;

(4) material used to:

(A) solicit contracts from insureds; or

(B) modify existing contracts;

(5) material included with a contract when the contract is delivered and materials used in the solicitation of contract renewals, extensions or reinstatements, except those extensions or reinstatements provided for in the contract;

(6) lead card solicitations, defined as communications distributed to the public which, regardless of form, content, or stated purpose, are intended to result in the compilation or qualification of a list containing names or other personal information regarding insureds who have expressed a specific interest in obtaining assistance with having their claims settled, and which are intended to be used to solicit residents of this state for the execution of a contract for a public insurance adjuster's services; and

(7) any other communication directly or indirectly related to a public insurance adjuster contract, and intended to result in the eventual execution of such a contract.

(b) "Advertisement" does not include:

(1) communications or materials used within a public insurance adjuster's own organization, not used as promotional aids and not disseminated to the public;

(2) communications with insureds other than materials soliciting insureds to enter, renew, extend or reinstate a contract for a public insurance adjuster's services; and

(3) material used solely for the recruitment, training, and education of a public insurance adjuster's personnel and subcontractors, provided it is not also used to induce the public to enter, renew, extend or reinstate a contract for a public insurance adjuster's services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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SUBCHAPTER I. LICENSING FEES

28 TAC §19.802

These sections are proposed under Insurance Code Articles 21.01, 21.01-1, 21.01-2, and 21.07-5, and §§36.001 and 801.056, and Government Code §2054.252. Article 21.01 §3 provides that Insurance Code Chapter 21, Subchapter A applies to the listed licensees and §4 authorizes the commissioner to adopt rules to implement the subchapter. Article 21.01-1 §1 authorizes the commissioner to require applicants to take examinations through a department-designated vendor. Article 21.01-1 §3 authorizes the commissioner to develop a continuing education program for licensees. Article 21.01-2 §3A authorizes the commissioner to refuse, deny, revoke or suspend a license or license application. Article 21.07-5 §29 authorizes the department to adopt rules necessary to implement Article 21.07-5 and define the term advertisement. Insurance Code §801.056 authorizes the commissioner to require applicants to submit a complete set of fingerprints prior to licensure. Government Code §2054.252 (g) requires the department to increase licensing fees in an amount sufficient to cover the Texas OnLine Authority subscription fee cost. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the

powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by the proposal: Rule No. Statute Insurance Code Articles 21.07-5, 21.01, 21.01-1, 21.01-1 and 21.07-5 21.01, 21.01-1, and 21.07-5 §19.803 Government Code §2054.252

§19.802. Amount of Fees.

(a) (No change.)

(b) The amounts of fees are as follows:

(1)-(19) (No change.)

(20) Public insurance adjuster:

(A) original application -- $50;

(B) renewal -- $50;

(C) qualifying examination $50.

(21) Public insurance adjuster temporary training certificate:

(A) training certificate -- $50;

(B) renewal -- $50.

(c)-(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Department of Insurance
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For further information, please call: (512) 463-6327

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SUBCHAPTER K CONTINUING EDUCATION AND ADJUSTER PRELICENSING EDUCATION PROGRAMS

28 TAC §19.1002

These sections are proposed under Insurance Code Articles 21.01, 21.01-1, 21.01-2, and 21.07-5, and §§36.001 and 801.056, and Government Code §2054.252. Article 21.01 §3 provides that Insurance Code Chapter 21, Subchapter A applies to the listed licensees and §4 authorizes the commissioner to adopt rules to implement the subchapter. Article 21.01-1 §1 authorizes the commissioner to require applicants to take examinations through a department-designated vendor. Article 21.01-1 §3 authorizes the commissioner to develop a continuing education program for licensees. Article 21.01-2 §3A authorizes the commissioner to refuse, deny, revoke or suspend a license or license application. Article 21.07-5 §29 authorizes the department to adopt rules necessary to implement Article 21.07-5 and define the term advertisement. Insurance Code §801.056 authorizes the commissioner to require applicants to submit a complete set of fingerprints prior to licensure. Government Code §2054.252 (g) requires the department to increase licensing fees in an amount sufficient to cover the Texas OnLine Authority subscription fee cost. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by the proposal: Rule No. Statute Insurance Code Articles 21.07-5, 21.01, 21.01-1, 21.01-1 and 21.07-5 21.01, 21.01-1, and 21.07-5 §19.803 Government Code §2054.252

§19.1002. Definitions.

(a) (No change.)

(b) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(15) (No change.)

(16) Licensee--An adjuster or individual holding a license under the authority of Insurance Code Articles 21.07-1 §§2, 4 or 6 (general lines - life, accident, and health agent, limited lines agent, or life insurance not exceeding $15,000 agent); 21.07-2 (life and health insurance counselor); 21.07-3 (managing general agent); 21.07-5 (public insurance adjuster); or 21.14 §§2, 6, 8, or 9 (general lines - property and casualty agent, limited lines agent, insurance service representative or county mutual agent).

(17)-(27) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. VARIABLE CONTRACT AGENTS

28 TAC §§19.701 - 19.709

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Insurance proposes repeal of Subchapter H, §§19.701- 19.709 concerning variable contract agents. Repeal of this subchapter is necessary since the variable contract agent license was discontinued by Senate Bill 414, 77th legislature. Authority to write variable life insurance contracts is now part of the general life, accident, and health insurance agent license, issued under Insurance Code Article 21.07-1.

Matt Ray, deputy commissioner, licensing division, has determined that during the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections.

There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Ray, deputy commissioner, licensing division, has also determined that for each year of the first five years the repeal is in effect, the anticipated public benefit will be the removal of obsolete and potentially confusing provisions from the Texas Administrative Code. There is no anticipated economic cost to persons as a result of the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on September 22, 2003 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing must be submitted separately to the Office of Chief Clerk.

Repeal of §§19.701- 19.709 is proposed pursuant to the Insurance Code Articles 3.75 and 21.07-1, and §36.001. Article 3.75 §7 provides that variable contracts may only be written by persons holding an appropriate Article 21.07-1 license that is issued in accordance with Subchapter A, Chapter 21, Insurance Code. Article 21.07-1 §2(a)(4) provides general life, accident, and health agents with authority to write variable life contracts. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The proposed repeal affects regulation pursuant to the following statutes: *RuleStatute* §§19.701- 19.709 Insurance Code Articles 3.75 and 21.07-1

§19.701. Variable Contract Agent's License.
§19.702. Examination.
§19.703. Application for License.
§19.704. Issuance or Denial of License.
§19.705. Nonresident Agents.
§19.706. Expiration and Renewal of Licenses.
§19.707. Termination of Contract.
§19.708. Prohibitions.
§19.709. Denial, Suspension, or Revocation of Licenses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE
SUBCHAPTER T. FINANCIAL ASSURANCE FOR NEAR-SURFACE LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

The Texas Commission on Environmental Quality (agency or commission) proposes amendments to §§37.9030, 37.9035, 37.9040, 37.9045, and 37.9050. The commission also proposes new §37.9052 and §37.9059, and the repeal of §37.9055. The amended, repealed, and new sections are being proposed in Subchapter T, Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement House Bill (HB) 1567, 78th Legislature, 2003, and its amendments to the Texas Health and Safety Code, Chapter 401 (also known as the Texas Radiation Control Act). Subchapter T applies to financial assurance for near-surface land disposal facilities for low-level radioactive waste regulated by the State of Texas under 30 TAC Chapter 336, Subchapter H (Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste). Subchapter T is proposed for change due to the addition of new financial assurance requirements and options for demonstrating financial assurance in accordance with HB 1567.

SECTION BY SECTION DISCUSSION

Section 37.9030, Applicability

The amendments to §37.9030 would add financial assurance requirements for corrective action and liability coverage. The purpose of this amendment is to add financial assurance requirements for liability coverage and financial security to address and prevent unplanned events under Texas Health and Safety Code, §401.233 and §401.241, respectively.

Section 37.9035, Definitions

The proposed amendments to §37.9035 would add a definition of "Corrective action" to identify the new financial assurance requirements added by Texas Health and Safety Code, §401.241. The definition tracks the statutory language which requires the commission to obtain financial security from the compact facility license holder to address and prevent unplanned events that pose a risk to public health and safety and that may occur after the decommissioning and closure of the compact waste disposal facility or a federal waste disposal facility. Adding the definition for "Corrective action" allows the general subchapters in Chapter 37 to remain unchanged. The definition for "Institutional control" is proposed to read "shall have the same meaning as post closure" to better define the term. The general subchapters of Chapter 37 use the term post closure in identifying activities requiring financial assurance. In addition, the proposed amendments would add a definition for "Licensee" to §37.9035 stating that for the purposes of this subchapter, the term "licensee" shall have the same meaning as owner, operator, or license holder. This proposed definition conforms this subchapter with the general subchapters in Chapter 37 which use the terms "owner" and "operator," and Texas Health and Safety Code, §401.241, which uses the term "license holder." The definition for "Post closure" is proposed to read "The activities which are identified as institutional control as specified in §336.734 (relating to Institutional

Requirements)," to expand and improve the definition. Finally, the definitions section is proposed to be renumbered because of the additional definitions.

Section 37.9040, Submission of Documents

The proposed amendment to §37.9040 would add "corrective action" and "liability coverage" to the documentation that must be submitted to the executive director to demonstrate financial assurance under Texas Health and Safety Code, §401.233 and §401.241, respectively.

Section 37.9045, Financial Assurance Requirements for Closure and Post Closure

The proposed amendments to §37.9045 would change the section title from "Financial Assurance Requirements for Closure and Post Closure" to "Financial Assurance Requirements for Closure, Post Closure, and Corrective Action" to add the additional financial assurance requirement for unplanned events under Texas Health and Safety Code, §401.241. Subsection (a) is proposed to be amended to add "corrective action" for the same reason cited for changing the section title. The payment schedule for financial assurance for corrective action, required under Texas Health and Safety Code, §401.241, will be established in the low-level radioactive waste disposal license. Subsection (a)(5) is proposed to be amended to delete the word "an" as a grammatical correction, and to add language to clarify the intent of the subsection that "proof of forfeiture" is not required to collect financial assurance. United States Nuclear Regulatory Commission (NRC) regulations under 10 Code of Federal Regulations (CFR) §61.62(f) (related to funding for disposal site closure and stabilization) state that proof of forfeiture must not be necessary to collect financial assurance so that in the event the licensee could not obtain replacement financial assurance prior to cancellation, the financial assurance shall be automatically collected prior to its expiration. The NRC rule also states that the issuer's liability under the financial assurance mechanism must remain in effect until the closure and stabilization program is completed and approved by NRC, and the license transferred. The NRC intent is to ensure that financial assurance cannot be cancelled, terminated, or allowed to expire without NRC approval of replacement financial assurance or closure. Subsection (a)(5) is proposed to be amended to add ". . . prior to the expiration, cancellation, or termination . . ." ; to add that the financial assurance ". . . provider shall pay the face amount of the financial assurance into the perpetual care account" to conform with new requirements in Texas Health and Safety Code, §401.109(a); and to delete the phrase at the end of the sentence, ". . . mechanism shall be automatically collected prior to its expiration" as unnecessary language after the rewording of the subsection. Subsection (a)(6) is proposed to be added to require that all financial assurance that is converted to cash by the direction of the executive director shall be deposited to the credit of the perpetual care account in accordance with new requirements in Texas Health and Safety Code, §401.109(a).

Section 37.9050, Financial Assurance Mechanisms

The proposed amendment to §37.9050(b) would delete the language allowing the use of a performance bond as a demonstration of financial assurance. A performance bond would give a surety the option to perform the required activities of closure, post closure, and corrective action under the license. This is not appropriate for low level radioactive waste disposal facilities for two reasons. First, by statute a single, qualified licensee must be put through a rigorous licensing process based on the qualifications of the licensee. To allow a surety to perform without the same evaluation and qualification is contrary to the licensing process. Second, the agency assumes control of the facility after closure; therefore, a funding mechanism rather than a performing mechanism is required. A payment bond issued by a surety remains an option which meets the requirements of Texas Health and Safety Code, §401.109, and NRC requirements which both allow the use of a "surety bond."

A proposed new §37.9050(f) would include insurance as an additional financial assurance option in accordance with Texas Health and Safety Code, §401.109(d), which lists among acceptable financial assurance mechanisms, ". . . an insurance policy, the form and content of which is acceptable to the agency." The requirements of this new subsection are intended to identify the acceptable form and content based on current commission rules and practices, address NRC requirements for security, and address some shortcomings of insurance as a financial assurance mechanism that have been identified by the United States Environmental Protection Agency Office of the Inspector General, various states, and a work group of the Association of State and Territorial Solid Waste Management Officials. The provisions within this subsection are designed to ensure the following: the diversification and transfer of risk, the long-term viability and strength of insurers, the performance of the financial mechanism over a long period of time, and the administration of the mechanism without specialized legal expertise in insurance. Proposed new subsection (f)(1) would require that all insurers and reinsurers be authorized to transact the business of insurance in Texas and have financial strength and size categories as assigned by A.M. Best Company equivalent to "excellent" and at least $2 billion in capital, surplus, and conditional reserve funds. The six primary insurers that issue closure insurance for Resource Conservation and Recovery Act (RCRA) facilities meet these standards. These requirements assure the financial capacities of the primary insurer and any reinsurers on the policy to perform as required. Proposed new subsection (f)(2) states that the insurance certificate required to satisfy financial assurance requirements must include a written statement in language acceptable to the executive director from an authorized officer of each insurer and reinsurer stipulating that the insurance certificate is legally valid and enforceable as the binding agreement superseding any insurance policy provisions which are inconsistent with the requirements of this subsection. The statement must also covenant that the insurer or reinsurer shall not raise as a defense any provision of the policy that is inconsistent with the requirements of this subsection. This requirement allows ease of administration of the financial assurance mechanism without the need for continuous legal expertise at the commission in the highly specialized business of insurance. It allows the commission to obtain a simple, two-page document that can be relied upon to meet financial assurance requirements. In the absence of a simple document, expert legal review of a lengthy and complex insurance contract would be required upon initial submission of the policy, and each time that the policy was renewed, endorsed, or modified. The written statement from the insurer and reinsurers would provide the necessary assurance that the insurance certificate could be relied upon even if the policy, which is a contract between the licensee and the insurance company, has provisions contrary to the requirements of this subsection. Proposed new subsection (f)(3) requires the policy to designate the agency as an additional insured, which provides more security by making the agency a party to the insurance contract. Proposed new subsection

(f)(4) requires the owner or operator to maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the insurance premium without substitution of acceptable, alternate financial assurance constitutes a violation of Chapter 37, warranting such remedy as the executive director deems necessary. If insurance is used as a financial assurance mechanism, license conditions will also be placed in the low-level radioactive waste disposal license related to a licensee's failure to pay any insurance premium. Failure to maintain viable financial assurance, including insurance in full force, will result in possible revocation of a low-level radioactive waste disposal license. Because financial assurance for this license must be available as a funding mechanism many years after the license is issued, continuation of the insurance or the ability to prevent the loss of financial assurance must be assured in the absence of the executive director's approval of an alternate mechanism or of release from financial assurance requirements. Proposed new subsection (f)(5) states that the policy may only be cancelled, terminated, or not renewed for failure to pay the insurance premium, and requires the insurer to notify both the executive director and the owner or operator by certified mail of intent to cancel, terminate, or not renew the policy. The insurer must provide 120 days' notice, which allows the owner or operator sufficient time to pay the premium or obtain alternate, acceptable financial assurance. The notice period also allows the executive director to take appropriate action to ensure there is no loss of financial assurance. Proposed new subsection (f)(6) identifies the triggering mechanisms, the occurrence of which prevent a policy from being cancelled, terminated, or not renewed to prevent a loss of financial assurance. The triggering mechanisms include: the executive director deems the facility abandoned; the license expires, is terminated, is revoked, or a new or renewal license is denied; closure is ordered by the executive director or by a United States district court or other court of competent jurisdiction; the owner or operator is named as a debtor in a voluntary or involuntary proceeding under the Bankruptcy Code; or the insurance premium due is paid. Proposed new subsection (f)(7) states that the insurance policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction. This language is meant to address problems identified by other states that have been presented with similar policy language as a reason for nonpayment of insurance claims. This language ensures that insurance can be relied on as a funding mechanism without concern that an insurer can deny funding based on such exclusionary language in the policy. Proposed new subsection (f)(8) requires that the insurance certificate submitted to demonstrate financial assurance must be worded exactly as presented in new §37.9052. This ensures that all of the requirements of this section are met. Proposed new subsection (f)(9) states that the insurance must be issued in the amount of the cost estimates for closure, post closure, and corrective action except when provided in combination with other approved financial assurance mechanisms. Proposed new subsection (f)(10) requires that the policy must guarantee that funds will be available to provide for closure, post closure, or corrective action, and that the issuer of the policy will be responsible for paying out funds upon direction of the executive director up to the face amount of the policy. Proposed new subsection (f)(11) sets out the framework for the licensee or any other person authorized to perform closure, post closure, or corrective action to request reimbursement of expenditures by submitting itemized bills to the executive director. Proposed new subsection (f)(12) provides that once the insurer becomes liable to make payments under the policy, the face amount of the policy, less any payments made, must be increased annually based on an identifiable investment rate. This provision is an equivalent provision to insurance requirements for RCRA facilities found in §37.241(k) (Insurance). Because operations will have stopped at the facility by the time the insurer becomes liable to make payments, the licensee's ability to fund increasing financial assurance amounts would be in doubt. This provision ensures that most of the investment earnings on the funds held by the insurer will be available to pay for closure, post closure, and corrective action activities. Proposed subsection (f)(13) requires that once the institutional control period begins, the insurer must pay the remaining face amount of the policy to the perpetual care account. This provision meets the requirements of §336.734 (Institutional Requirements), which requires the custodial agency to carry out the institutional control program.

Section 37.9052, Certificate of Insurance

Section 37.9052 is proposed to be added to provide the required language for the insurance certificate to satisfy financial assurance requirements for closure, post closure, and corrective action specified in proposed §37.9050(f).

Section 37.9055, Institutional Control Requirements

The commission proposes to repeal §37.9055 because this section does not address the requirement for financial assurance for institutional control, and therefore, serves no purpose.

Section 37.9059, Financial Assurance Requirements for Liability

Section 37.9059 is proposed to be added. Liability coverage is a requirement for the licensee under Texas Health and Safety Code, §401.233(d), in an amount and type acceptable to the commission and adequate to cover potential injury to any property or person. Absent a statutorily defined amount of coverage required, the commission proposes the same amounts of coverage required for a RCRA disposal facility. The licensee must provide financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. The licensee must provide financial assurance for bodily injury and property damage to third parties caused by non-sudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. Proposed new subsection (e) allows the use of any of the financial assurance mechanisms allowed under Subchapter F (Financial Assurance Mechanisms for Liability), except for self-insurance through a financial test and a corporate guarantee. The exceptions are not proposed as acceptable mechanisms for liability coverage because they are not acceptable for closure, post closure, and corrective action in accordance with NRC requirements under 10 CFR §61.62(g). Proposed new subsection (f) requires that if a "claims-made" insurance policy is used, the applicant must place an amount in escrow sufficient to pay for an additional year of premiums on notice of termination of coverage. This requirement mirrors the requirement in Texas Health and Safety Code, §361.085(i), which has been adopted in §37.6031(f) (Financial Assurance Requirements for Liability) for hazardous and nonhazardous industrial solid waste facilities. This requirement is intended to ensure that a liability insurance policy is not cancelled for nonpayment of premiums, which might result in nonpayment of valid third-party

claims in situations where the licensee's financial condition deteriorates rapidly. Proposed new subsection (g) specifies that limits of coverage required in this subsection are distinct from any other liability coverage requirements. The purpose of this language is to prohibit stacking of coverage limits such that liability coverage requirements for the operation of the low level radioactive waste disposal facilities cannot be met with liability coverage provided by the licensee to satisfy other program financial assurance requirements such as RCRA and for petroleum underground storage tanks.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rules are in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The rule amendments are proposed as part of a larger proposal in order to implement HB 1567, which provides requirements for the licensing of a low-level radioactive waste disposal site in Texas. The proposed amendments to this chapter add new financial assurance requirements and options for demonstrating financial assurance, as provided in HB 1567.

Any applicant for a license to dispose of low-level radioactive waste will be required to comply with the new financial assurance rules. The rules are proposed to be amended to include insurance as an additional financial assurance option in accordance with Texas Health and Safety Code, §401.109(d). Insurance was added as an acceptable mechanism by HB 1567. The proposed rules add financial assurance requirements for corrective action activities and requirements for liability coverage.

No significant fiscal implications are expected for the agency to develop, review, approve, and maintain the proposed financial assurance requirements. The 78th Legislature appropriated the agency funding (estimated to be $954,018 in Fiscal Year 2004 and $1,049,018 in Fiscal Year 2005 from fees and balances in the Low-Level Waste Account) and personnel (five additional full time equivalent positions in 2004 and 1.5 additional full time equivalent positions in 2005) to implement HB 1567 and to provide for the licensing of a low-level radioactive waste disposal facility. Costs to other units of state and local government are not anticipated.

PUBLIC BENEFIT AND COSTS

Mr. Horvath also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be greater certainty that adequate amounts of financial assurance are provided for a future low-level radioactive waste disposal site to ensure protection of public health and safety and the environment.

Fiscal implications are anticipated to businesses or individuals who wish to meet the proposed financial assurance requirements necessary to obtain a license to dispose of low-level radioactive waste.

The proposed rules establish financial assurance requirements for site closure, post closure, and corrective action activities. HB 1567 requires that in determining the amount of security required of a compact waste disposal facility license holder, the agency shall also consider the need for financial security to address and prevent unplanned events that pose a risk to public health and safety and that may occur after the decommissioning and closure of the compact waste disposal facility or a licensed federal waste disposal facility. The legislation requires that a minimum of $20 million in security be provided at the time the facility is decommissioned. Because it is not known when the facility would be decommissioned, the minimum required amount of security would be available for corrective action when the license is issued. A payment schedule for corrective action financial assurance will be established in the low-level radioactive waste disposal license for any required amounts above the minimum requirement. The total amount of security established in the payment schedule would be based upon the amount of low-level waste received at the site, long term risks, and the need to address and prevent unplanned events. The payment schedule must be sufficient to ensure that the amount of security provided by the license holder at any time between the issuance of the license and the time at which the facility is decommissioned is sufficient to address any increase in the risk to public health and safety that accompanies an increase in the volume of waste and meet the requirements of the agency to address unplanned events.

Prior to facility operation, financial assurance for the institutional control period and disposal site closure and stabilization must also be in place. A license holder would be allowed to use insurance to meet these requirements. Financial assurance costs for closure and post-closure activities will depend upon cost estimates to perform those activities. The costs estimates for closure and post-closure activities will not be known until the license application has been evaluated.

The proposed rules include insurance as an acceptable financial assurance option in accordance with HB 1567. The proposed rules are designed to ensure diversification and transfer of risk, long-term viability and strength of insurers, performance of the financial mechanism over a long period of time, and administration of the mechanism without specialized legal expertise in insurance. The proposed rules require that all insurers and reinsurers be authorized to transact the business of insurance in Texas and have financial strength and size categories as assigned by A.M. Best Company equivalent to "excellent" and at least $2 billion in capital, surplus, and conditional reserve funds. There are six primary insurers that issue closure insurance for the RCRA facilities that meet these standards.

The proposed rules require the owner or operator to maintain the insurance policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the insurance premium without substitution of acceptable, alternate financial assurance constitutes a violation of Chapter 37, warranting such remedy as the executive director deems necessary. If insurance is used as a financial assurance mechanism, conditions will also be placed in the low-level radioactive waste disposal license related to a licensee's failure to pay any insurance premium. Failure to maintain viable financial assurance, including insurance in full force, will result in possible revocation of a low-level radioactive waste disposal license.

The proposed rules require that the policy must guarantee funds will be available to provide for closure, post-closure, or corrective action, and that the issuer of the policy will be responsible for paying out funds upon direction of the executive director up to the face amount of the policy. The amendments set out the

framework for the licensee or any other person authorized to perform closure, post-closure, or corrective action to request reimbursement of expenditures by submitting itemized bills to the executive director. In addition, once the insurer becomes liable to make payments under the policy, the face amount of the policy, less any payments made, must be increased annually based on an identifiable investment rate. Because operations will have stopped at the facility by the time the insurer becomes liable to make payments, the licensee's ability to fund increasing financial assurance amounts would be in doubt. The amendments ensure that most of the investment earnings on the funds held by the insurer will be available to pay for closure, post-closure, and corrective action activities and require that once the institutional control period begins, the insurer must pay the remaining face amount of the policy to the Perpetual Care Account.

Financial assurance in the form of securities or cash must be deposited into the Perpetual Care Account. Money and security in the perpetual care account may be used only for the decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, and disposal of radioactive material for the protection of the public health and safety and the environment. The 78th Legislature appropriated the agency any revenues and proceeds in the Perpetual Care Account for the previously stated purposes.

The proposed rules would require financial assurance requirements for liability coverage adequate to cover potential injury to any property or person. The same amount of coverage is proposed as is currently required for hazardous and nonhazardous industrial solid waste facilities. The licensee must provide financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. The licensee must provide financial assurance for bodily injury and property damage to third parties caused by non-sudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. Annual premium costs are estimated to be between $40,000 and $70,000 for this type of coverage.

Any costs incurred by the licensee to meet proposed or current financial assurance requirements are expected to be recovered through fees collected by the licensee assessed for the disposal of low-level radioactive waste. Fees will be assessed to waste generators in Texas and the other Texas Low-Level Radioactive Waste Disposal Compact party states, such as electric utilities and hospitals. Fee amounts will depend upon many variables including the amount and type of waste disposed of, and is expected to be addressed in future rulemaking.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed rules because there are no known small or micro-businesses that own or operate, or are likely to own or operate, a low-level radioactive waste disposal site with a $500,000 application fee. The proposal merely clarifies the financial assurance requirements for such a site, when established.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed the proposed rules and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 37 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because they address the financial assurance requirements for a low-level radioactive waste disposal site. The proposed rulemaking implements legislative requirements in HB 1567 for financial assurance for liability and corrective action and the use of insurance for licenses issued under Chapter 336, Subchapter H.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. In addition, the State of Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules do not exceed the standards set by federal law.

The proposed rules do not exceed an express requirement of state law. Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive materials. The purpose of the rulemaking action is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401 as provided in HB 1567. The proposed rules address the requirements for financial assurance for liability and corrective action and the use of insurance as provided by HB 1567.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated

as an "Agreement State" by the NRC under the authority of the Atomic Energy Act, which requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules do not exceed the NRC requirements nor exceed the requirements for retaining status as an "Agreement State."

The rules are proposed under specific authority of Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Chapter 2007 does not apply to these proposed rules because the rules are administrative in nature and will not affect real property values. The purpose of this rulemaking action is to implement legislative requirements in HB 1567 and advances this purpose by establishing financial assurance requirements for liability and corrective action, and the use of insurance as a financial assurance mechanism for low-level radioactive waste disposal for licenses issued under Chapter 336, Subchapter H.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules implement administrative changes to the requirements for financial insurance for a low-level radioactive waste disposal licenses issued under Subchapter H of Chapter 336. The proposed rules address requirements for liability and corrective action coverage and the use of insurance for financial assurance.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rules are neither identified in, nor will their amendment affect, any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program. Therefore, the proposed rulemaking is not subject to the Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 16, 2003, at 1:30 p.m. at the commission's central office, 12100 Park 35 Circle, Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and will be available to answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, and who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037-336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information or questions concerning this proposal, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Office of Environmental Policy, Analysis, and Assessment at (512) 239-1510.

30 TAC §§37.9030, 37.9035, 37.9040, 37.9045, 37.9050, 37.9052, 37.9059

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments and new sections implement Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§37.9030. Applicability.

This subchapter applies to owners or operators required to provide financial assurance under Chapter 336, Subchapter H of this title (relating to Licensing Requirements <u>for</u> [~~For~~] Near-Surface Land Disposal of Low-Level Radioactive Waste). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure<u>,</u> [~~and~~] post closure<u>, corrective action, and liability coverage</u>.

§37.9035. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), §336.2 of this title (relating to Definitions), and §336.702 of this title (relating to Definitions), except the following definitions shall apply for this subchapter.

(1) - (2) (No change.)

(3) Corrective action--The activities to remediate unplanned events that pose a risk to public health and safety and that may occur after the decommissioning and closure of the compact waste disposal facility or a federal facility waste disposal facility.

(4) [~~(3)~~] Facility--All contiguous land, water, buildings, structures, and equipment which are or were used for the disposal of radioactive waste, including the radioactive waste, and soils and groundwater contaminated by radioactive material.

(5) [~~(4)~~] Institutional control--Shall have the same meaning [~~be referenced~~] as post closure.

(6) Licensee--Shall have the same meaning as owner, operator, or license holder.

(7) [~~(5)~~] Post closure--The activities which are identified [~~same~~] as institutional control as specified in §336.734 of this title (relating to Institutional Requirements).

§37.9040. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance for closure, [~~or~~] post closure, corrective action, and liability coverage must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to commencement of operations.

§37.9045. Financial Assurance Requirements for Closure, [~~and~~] Post Closure, Corrective Action, and Liability Coverage.

(a) An owner or operator subject to this subchapter shall establish financial assurance for the closure, [~~or~~] post closure, corrective action, and liability coverage of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

(1) An owner or operator subject to this subchapter may use any of the mechanisms as specified in §37.9050 of this title (relating to Financial Assurance Mechanisms) to demonstrate financial assurance for closure, [~~or~~] post closure, and corrective action. On a case-by-case basis, the executive director may approve other alternative financial assurance mechanisms.

(2) - (4) (No change.)

(5) Proof of forfeiture must not be necessary to collect the financial assurance, so that in the event that the owner or operator does not provide [~~an~~] acceptable replacement financial assurance within the required time prior to the expiration, cancellation, or termination of the financial assurance mechanism, the financial assurance provider shall pay the face amount of the financial assurance into the perpetual care account [~~mechanism shall be automatically collected prior to its expiration~~].

(6) All financial assurance required to be converted to cash by direction of the executive director under §§336.736 - 336.738 and 37.101 of this title (relating to Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; and Drawing on the Financial Assurance Mechanisms) and paragraph (5) of this subsection shall be deposited to the credit of the perpetual care account.

(b) The owner or operator shall comply with §37.71 of this title (relating to Incapacity of Owners or Operators, Guarantors, or Financial [~~Issuing~~] Institutions), except financial assurance must be established within 30 days after such an event.

§37.9050. Financial Assurance Mechanisms.

(a) (No change.)

(b) An owner or operator may satisfy the requirements of a surety bond guaranteeing payment as provided in §37.211 of this title (relating to Surety Bond Guaranteeing Payment)[~~, or a surety bond guaranteeing performance as provided in §37.221 of this title (relating to Surety Bond Guaranteeing Performance),~~] except:

(1) - (3) (No change.)

(c) - (e) (No change.)

(f) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance which conforms to the requirements of this subsection, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally-signed certificate to the executive director.

(1) At a minimum, the insurer and any reinsurers on the policy must be authorized to transact the business of insurance in Texas and have a minimum financial strength rating of "A" and a financial size category of "XV" as assigned by the A.M. Best Company.

(2) An insurance certificate may be used to satisfy the requirements of financial assurance of this section only if the insurer and any reinsurer on the policy have submitted a written statement in language acceptable to the executive director from an officer of each entity authorized to bind the entity that stipulates that the insurance certificate in this subsection is legally valid and enforceable as the binding agreement superseding any insurance policy provisions which are inconsistent with the requirements of this subsection. The statement must also covenant that the insurer or reinsurer shall not raise as a defense any provision of the policy that is inconsistent with the requirements of this subsection.

(3) The insurance policy must designate the commission as an additional insured.

(4) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(5) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(6) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration of the policy:

(A) the executive director deems the facility abandoned;

(B) the license expires, is terminated, is revoked, or a new or renewal license is denied;

(C) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction;

(D) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(E) the premium due is paid.

(7) The insurance policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction.

(8) The wording of the certificate of insurance must be identical to the wording specified in §37.9052 of this title (relating to Certificate of Insurance).

(9) The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure, post closure, or corrective action, except when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms). Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(10) The insurance policy must guarantee that funds shall be available to provide for closure, post closure, or corrective action of the facility. The policy shall also guarantee that once closure, post closure, or corrective action begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(11) An owner or operator or any other person authorized to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or are otherwise justified and, if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain financial assurance requirements for closure, post closure, or corrective action of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

(12) Commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85% of the most recent investment rate or of the equivalent coupon issue yield announced by the United States Treasury for 26-week Treasury securities.

(13) Upon notification by the executive director that the institutional control period has begun, the insurer will pay the remaining face amount of the policy to the perpetual care account.

§37.9052. Certificate of Insurance.

A certificate of insurance for closure, post closure, or corrective action, as specified in §37.9050(f) of this title (relating to Financial Assurance Mechanisms), must be worded as specified in the Certificate of Insurance in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.9052

§37.9059. Financial Assurance Requirements for Liability.

(a) Owners or operators required to demonstrate for liability must comply with Subchapters A, E, F, and G of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Liability Coverage; Financial Assurance Mechanisms for Liability; and Wording of the Mechanisms for Liability).

(b) An owner or operator subject to this section must demonstrate financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the compact waste disposal facility and/or federal facility waste disposal facility. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs.

(c) An owner or operator subject to this section must demonstrate financial assurance for bodily injury and property damage to third parties caused by non-sudden accidental occurrences arising from operations of the compact waste disposal facility and/or federal facility waste disposal facility. An owner or operator must have and maintain liability coverage for non-sudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs.

(d) Owners or operators who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and non-sudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and non-sudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and non-sudden accidental occurrences must maintain liability coverage in the amount of at least $4 million per occurrence and $8 million annual aggregate.

(e) Owners or operators subject to this subchapter may use any of the mechanisms specified in Subchapter F of this chapter except for the Financial Test for Liability and the Corporate Guarantee for Liability to demonstrate financial assurance for sudden and for non-sudden liability.

(f) Owners or operators required to provide liability coverage may not use a claims-made insurance policy as security unless the applicant places in escrow, as provided by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy by the state on notice of termination of coverage.

(g) The required limits of coverage in this subsection are distinct from any other liability requirements under this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304825
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 239-4712

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30 TAC §37.9055

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The repeal is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed repeal implements Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§37.9055. Institutional Control Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 39. PUBLIC NOTICE
SUBCHAPTER M. PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

30 TAC §§39.703, 39.707, 39.709

The Texas Commission on Environmental Quality (commission) proposes amendments to §§39.703, 39.707, and 39.709.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement House Bill 1567, 78th Legislature, 2003, and its amendments to the Texas Health and Safety Code, Chapter 401 (also known as the Texas Radiation Control Act). Changes to implement House Bill 1567, relating to the licensing of low-level radioactive waste disposal, that are specific to this chapter include changes in procedures for providing notice of draft license and opportunity for hearing. Some additional changes outside the scope of the bill implementation are proposed to provide corrections to rule section titles, improve grammar, and correct typographical errors.

SECTION BY SECTION DISCUSSION

Section 39.703, Notice of Completion of Technical Review

The proposed amendment to §39.703(b) would correct the title for Chapter 336, Subchapter F, Licensing of Alternative Methods of Disposal of Radioactive Material.

Section 39.707, Published Notice

The proposed amendment to §39.707(a) would correct the title for 30 TAC Chapter 336, Subchapter F. The proposed amendment to §39.707(b) would change the requirements for providing published notice of the draft license and opportunity for hearing. The proposed amendment provides that notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. The proposed amendment also requires that the draft license and application materials be available for review at the offices of the commission and in a public place in the county or counties in which the proposed disposal facility site is located. Public places may include a county courthouse, public library, city hall, or other public location where members of the public may have access to the materials for review and photocopying. The proposed amendment conforms with new statutory requirements given in Texas Health and Safety Code, §401.238.

Section 39.709, Notice of Contested Case Hearing on Application

The proposed amendment to §39.709(a) would delete the acronym "SOAH" and substitute "the State Office of Administrative Hearings" because the term is only used once in the section. The proposed amendment to §39.709(b) would correct the title for Chapter 336, Subchapter F.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rules are in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The rule amendments are proposed as part of a larger proposal in order to implement HB 1567, which provides requirements for the licensing of a low-level radioactive waste disposal site in Texas. Changes to implement HB 1567 that are specific to this chapter include changes in procedures for providing notice of draft license and opportunity for hearing. Some additional changes outside the scope of the bill implementation are proposed to provide corrections to rule section titles, improve grammar, and correct typographical errors.

The proposed rules conform with new statutory requirements given in Texas Health and Safety Code, §401.238. The proposed rules would change the requirements for providing published notice of the draft license and opportunity for hearing. The proposed rules would require that upon completion of technical review and preparation of the draft license, the commission shall publish, at the applicant's expense, notice of the draft license and specify the requirements for requesting a contested case hearing by an affected person. The notice shall include a statement that the draft license is available for review on the commission's Web site and that the draft license and application materials are available for review at the offices of the commission and in a public place in the county or counties in which the proposed disposal facility site is located. Public places may include a county courthouse, public library, city hall, or other public location where members of the public may have access to the materials for review and photocopying.

Notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. The proposed rulemaking also makes nonsubstantive changes to Chapter 39 to correct citations to other laws.

Posting of the draft license on the commission's Web site and making available application materials at the commission offices and a public place in which the proposed facility is to be located is not expected to result in significant fiscal implications for the commission or the affected county.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be compliance with state law and the provision of public notice and opportunity for hearing for a draft license issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste.

No significant fiscal implications are anticipated to businesses or individuals who wish to meet the proposed notice requirements necessary to obtain a license to dispose of low-level radioactive waste.

The proposed rules would require that upon completion of technical review and preparation of the draft license, the commission shall publish, at the applicant's expense, notice of the draft license and specify the requirements for requesting a contested case hearing by an affected person. Notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. Costs for the applicant to publish notice in a newspaper of general circulation will vary, but are estimated to be between $250 and $800.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed rules because there are no known small or micro-businesses that own or operate, or are likely to own or operate, a low-level radioactive waste disposal site with a $500,000 application fee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 39 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because there are no significant requirements added to the noticing of draft licenses for radioactive material disposal facilities. The proposed rulemaking action implements legislative requirements in House Bill 1567, including a change in the publication of notice of a draft license issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste. The proposed rulemaking also makes nonsubstantive changes to Chapter 39 to correct citations to other laws.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. In addition, the State of Texas is an "Agreement State"

authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules do not exceed the standards set by federal law.

The proposed rules do not exceed an express requirement of state law. Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive materials. The purpose of the rulemaking action is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401 as provided in House Bill 1567. The proposed rule amendment changes the requirements for newspaper notice in accordance with the requirements of House Bill 1567.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act, which requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rule amendments do not exceed the NRC requirements nor exceed the requirements for retaining status as an "Agreement State."

The rules are proposed under specific authority of Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The proposed action implements legislative requirements in House Bill 1567, including a change in the publication of notice of a draft license issued under Chapter 336, Subchapter H. The proposed amendments to Chapter 39 affect only the procedural requirements for issuing notices of draft licenses. The proposed rulemaking also makes non-substantive changes to Chapter 39 to correct citations to other laws.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules implement non-substantive changes to existing rules and reflect a change in the procedural requirements for the notice of draft licenses provided in House Bill 1567.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this proposed rulemaking action and determined that the rules are neither identified in, nor will their amendment affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program. Therefore, the proposed rulemaking action is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin, Texas, on September 16, 2003, at 1:30 p.m., at the commission's central office, 12100 Park 35 Circle, Building E, Room 201. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and to answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs and who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037-336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Policy and Regulations Division at (512) 239-1510.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003,

§§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§39.703. Notice of Completion of Technical Review.

(a) (No change.)

(b) For any other application for a minor amendment to a license issued under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material) or Subchapter G of this title (relating to Decommissioning Standards), notice shall be mailed under this subchapter. The deadline to file public comment, protests, or hearing requests is ten days after mailing.

§39.707. Published Notice.

(a) For applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material) or Subchapter G of this title (relating to Decommissioning Standards), when notice is required to be published under this subchapter, the applicant shall publish notice at least once in a newspaper of largest general circulation in the county in which the facility is located.

(b) For applications for a new license, renewal license, or major amendment to a license issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), on completion of technical review and preparation of the draft license, the commission shall publish, at the applicant's expense, notice of the draft license and specify the requirements for requesting a contested case hearing by a person affected. The notice shall include a statement that the draft license is available for review on the commission's Web site and that the draft license and application materials are available for review at the offices of the commission and in a public place in the county or counties in which the proposed disposal facility site is located. Notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. [~~when notice is required to be published under this subchapter, the applicant shall publish notice in a newspaper published in the county or counties in which the facility is or will be located. If no newspaper is published in the county or counties in which the facility is or will be located, a written copy of the notice shall be posted at the courthouse door and five other public places in the immediate locality to be affected. The notice shall be posted for at least 31 days.~~]

(c) (No change.)

§39.709. Notice of Contested Case Hearing on Application.

(a) The requirements of this section apply when an application is referred to the State Office of Administrative Hearings [~~SOAH~~] for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(b) For applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material) or Subchapter G of this title (relating to Decommissioning Standards), notice shall be mailed no later than 30 days before the hearing. For applications under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), notice shall be mailed no later than 31 days before the hearing.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (commission) proposes amendments to §305.53 and §305.127.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rule amendments is to implement House Bill (HB) 1567, 78th Legislature, 2003, and its amendments to Texas Health and Safety Code, Chapter 401. Some additional changes outside the scope of the bill implementation are proposed to correct citations to federal statutes, provide corrections to rule section titles, improve grammar, and reflect the commission's name change.

SECTION BY SECTION DISCUSSION

SUBCHAPTER C: APPLICATION FOR PERMIT

Section 305.53, Application Fee

A proposed amendment to §305.53(a)(7) would reflect the name change from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality to implement HB 2912, §18.01, 77th Legislature, 2001. The phrase "pursuant to" is proposed to be changed to "in accordance with" to incorporate plain language into the rule.

SUBCHAPTER F: PERMIT CHARACTERISTICS AND CONDITIONS

Section 305.127, Conditions to be Determined for Individual Permits

The proposed amendment to the first sentence of §305.127 would replace the phrase "set forth herein" with "specified in this section" to incorporate plain language into the rule. In addition, proposed amendments to §305.127(4)(A) and (C) would correct the titles of 30 TAC Chapters 309 (Domestic Wastewater Effluent Limitation and Plant Siting) and 30 TAC Chapter 336 (Radioactive Substance Rules).

The proposed amendments to §305.127(1)(G)(i) would require an initial license term of 15 years rather than a fixed licensing period of 20 years, in accordance with new Texas Health and Safety Code, §401.222. A new sentence is also proposed to be added stating: "After the initial 15 years, the commission may renew the license for one or more terms of ten years." This sentence is proposed to be added to implement new Texas Health and Safety Code, §401.222. For consistency with §336.716(h) (Terms and Conditions of License), a final sentence is proposed to be added which states, "The authority to dispose of waste expires on the date stated in the license except as provided in §336.718(a) of this title (relating to Application for Renewal or Closure)."

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The rules are proposed as part of a larger proposal in order to implement HB 1567, which provides requirements for the licensing of a low-level radioactive waste (LLRW) disposal site in Texas. The proposed rules implement a change in the term of an LLRW disposal license from 20 to 15 years. After the initial 15 years, the commission may renew the license for one or more terms of ten years.

Proposed rulemaking by the commission to implement HB 1567 in other parts of this proposal provide requirements for the licensing of an LLRW disposal site in Texas and establish procedures for the commission to accept and evaluate license applications from private entities to dispose of LLRW. Under the legislatively required procedures, the commission does not anticipate that a license will be granted until 2007.

The renewal of a license, if granted, would take place outside of the five-year parameter of this fiscal note and, therefore, no fiscal implications are anticipated for units of state and local government, or businesses and individuals. However, if and when this event takes place, there are anticipated to be similar fiscal implications as there were for the initial license application. Under current commission rules, there is no renewal fee for a license to dispose of LLRW. There are provisions which require that an applicant submit an annual license fee and a fee for the actual costs incurred by the commission for hearings associated with an application for an LLRW disposal site. Therefore, the application for renewal would include a fee (the proposed application fee is $500,000), and the costs for any contested case hearing would be assessed to the applicant by the commission.

Under current requirements, the license holder for an LLRW disposal site is also required to submit an annual license fee to cover the state's actual expenses arising from the regulatory activities associated with the license. This fee shall include reimbursement for the salary and other expenses of resident inspectors.

These costs are also likely to be outside the five-year time frame. However, the commission estimates that two resident inspectors and an administrative assistant would be required on-site, along with any necessary capital equipment (vehicle, office equipment, sampling equipment, etc.). Total costs for resident inspectors are estimated to be between $200,000 and $250,000 per year. The annual license fee is also assumed to include central office administrative costs. The 78th Legislature appropriated the commission five additional full-time equivalent positions in 2004 and 1.5 additional full-time equivalent positions in 2005 to implement HB 1567 and to provide for the licensing of an LLRW disposal facility. This fiscal note assumes that these five full-time equivalent positions will be used to conduct geological, civil engineering, environmental engineering, hydrological, and other studies and regulatory activities associated with the license. Costs are estimated to be $350,000 per year. Total costs for the annual license fee are estimated to be $550,000 to $600,000.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be compliance with state law and established procedures for the commission to accept and evaluate license applications from private entities to dispose of LLRW to ensure protection of public health and safety and the environment.

No fiscal implications are anticipated to businesses or individuals who wish to meet the proposed requirements necessary to renew a license to dispose of LLRW for each year of the first five years the proposed rules are in effect.

The renewal of a license, if granted, would take place outside of the five-year parameter of this fiscal note, and therefore, no fiscal implications are anticipated for businesses or individuals. However, if a license is renewed, the commission anticipates there would be similar fiscal implications as there were for the initial license application. This fiscal note assumes that the application for renewal would include a fee (the proposed application fee is $500,000) and the costs for any contested case hearing (SOAH's cost alone are estimated to be $250,000; a previous contested case hearing on a license application of similar complexity had estimated commission costs of approximately $775,000 in 1998) which would be assessed to the applicant by the commission.

The holder of a license for an LLRW disposal site is also required to submit an annual license fee for the state to recover the actual expenses arising from the regulatory activities associated with the license. The fee shall include reimbursement for the salary and other expenses of resident inspectors. These costs to any licensee are likely to take place outside of the five-year period covered in this fiscal note. Costs for resident inspectors are estimated to be between $250,000 and $200,000 per year and commission administrative costs are estimated to be $350,000 per year. Total costs for the annual license fee are estimated to be $550,000 to $600,000. These costs would be recovered by the licensee through fees assessed to waste generators for the disposal of LLRW. Fees will be assessed to waste generators in Texas and the other Texas Low-Level Radioactive Waste Disposal Compact party states, and may include electric utilities, hospitals, and others.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed rules because there are no known small or micro-businesses that own or operate, or are likely to own or operate, an LLRW disposal site with a $500,000 application fee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required, because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and

safety of the state or a sector of the state. The proposed amendments to Chapter 305 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because there are no significant requirements added to radioactive material disposal facilities. The proposed rulemaking action implements legislative requirements in HB 1567, including a change in the term of license issued under Chapter 336, Subchapter H (Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), from 20 to 15 years. The proposed rulemaking also makes nonsubstantive changes to Chapter 305 to reflect the commission's name change to the Texas Commission on Environmental Quality, corrects citations to other laws, and incorporates plain language into the rules.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules do not exceed the standards set by federal law.

The proposed rules do not exceed an express requirement of state law. Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive materials. The purpose of the rulemaking action is to implement statutory requirements consistent with recent amendments to Chapter 401 as provided in HB 1567. The proposed rule amendment to change the term of a license issued under Chapter 336, Subchapter H, to 15 years is consistent with the requirements of HB 1567.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rule amendments do not exceed the NRC requirements nor exceed the requirements for retaining status as an "Agreement State."

The rules are proposed under specific authority of Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The proposed action implements legislative requirements in HB 1567, including a change in the term of license issued under Chapter 336, Subchapter H, from 20 to 15 years. The proposed rulemaking also makes non-substantive changes to Chapter 305 to reflect the commission's name change to the Texas Commission on Environmental Quality, corrects citations to other laws, and incorporates plain language into the rules.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules primarily implement non-substantive changes to existing rules and reflect the license term of 15 years required by HB 1567. There are no entities that currently have licenses issued under Chapter 336, Subchapter H.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with the CMP goals and policies. The proposed rulemaking action implements legislative requirements in HB 1567, including a change in the term of license issued under Chapter 336, Subchapter H, from 20 to 15 years. The proposed rulemaking action also makes non-substantive changes to Chapter 305 to reflect the commission's name change to the Texas Commission on Environmental Quality, to correct citations to other laws, and to incorporate plain language into the rules. This rulemaking action will not have direct or significant adverse effect on any coastal natural resource areas, because the rule amendments only affect counties outside the CMP area; will not have substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments will not violate or exceed any standards identified in the applicable CMP goals and policies. The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 16, 2003, at 1:30 p.m., at the commission's central

office, 12100 Park 35 Circle, Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and will be available to answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, and who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037-336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information or questions concerning this proposal, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Office of Environmental Policy, Analysis, and Assessment at (512) 239-1510.

SUBCHAPTER C. APPLICATION FOR PERMIT

30 TAC §305.53

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§305.53. Application Fee.

(a) Except for radioactive material licenses or as specifically provided hereunder, an applicant shall include with each application a fee of $100.

(1) - (6) (No change.)

(7) The fees established by this section are due at the time that the application is filed in accordance with §281.3 of this title (relating to Initial Review), except that for hazardous waste permit applications filed on or after September 1, 1985, but prior to the effective date of paragraph (2) of this subsection are due at the time that the application is forwarded to the chief clerk of the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality for purposes of issuance of the notice of application. Unless the recommendation of the executive director is that the application be denied, the commission will not consider an application for final decision until such time as the fees in accordance with [~~pursuant to~~] paragraph (2) of this subsection are paid.

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304821
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 239-4712

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SUBCHAPTER F. PERMIT CHARACTERISTICS AND CONDITIONS

30 TAC §305.127

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§305.127. Conditions to be Determined for Individual Permits.

Conditions to be determined on a case-by-case basis according to the criteria specified in this section [~~set forth herein~~], and when applicable, incorporated into the permit expressly or by reference, are:

(1) Duration.

(A) - (F) (No change.)

(G) Radioactive material licenses.

(i) Licenses issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) shall be issued for an initial term of 15 years from the date of issuance. After the initial 15 years, the commission may renew the license for one or more terms of ten years. The authority to dispose of waste expires on the date stated in the license except as provided in §336.718(a) of this title (relating to Application for Renewal or Closure) [~~for a fixed term not to exceed 20 years~~].

(ii) (No change.)

(2) - (3) (No change.)

(4) Requirements for individual programs.

(A) Requirements to provide for and assure compliance with standards set by the rules of the commission and the laws of Texas shall be determined and included in permits on a case-by-case basis to reflect the best method for attaining such compliance. Each permit shall contain terms and conditions as the commission determines necessary to protect human health and safety, and the environment. Reference is made to Chapter 330 of this title (relating to Municipal Solid Waste) for municipal solid waste facility standards, to Chapter 331 of this title (relating to Underground Injection Control) for injection well standards, to Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) for solid waste facility standards, to Chapter 336 of this title (relating to Radioactive Substance Rules) for radioactive material disposal standards, to Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting [~~Standards~~]) for waste discharge standards, and to Chapter 329 of this title (relating to Drilled or Mined Shafts) for drilled or mined shaft standards.

(B) (No change.)

(C) New, amended, modified, or renewed permits shall incorporate any applicable requirements contained in Chapter 331 of this title for injection well standards, Chapter 335 of this title for solid waste facility standards, Chapter 336 of this title [~~(relating to Radioactive Material Disposal Standards)~~], Chapter 309 of this title for waste discharge standards, and Chapter 329 of this title for drilled or mined shaft standards.

(5) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304822
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 239-4712

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CHAPTER 332. COMPOSTING

The Texas Commission on Environmental Quality (commission) proposes amendments to §§332.3, 332.8, 332.31, 332.37, 332.41, and 332.47.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking implements the requirements of House Bill 1791, 78th Legislature, 2003, which requires facilities that are composting grease trap waste to be permitted by the commission, where they are currently only required to be authorized by a registration. Existing operating facilities will be required to obtain a permit. Owners and operators for currently pending registration applications will be required to obtain a permit rather than a registration. All proposed sites will be required to apply for a permit. For existing facilities to continue operation, they must receive a permit from the commission on or before June 1, 2004.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are proposed throughout the sections to be consistent with Texas Register requirements.

Proposed new §332.3(a)(3), Applicability, adds operations that compost grease trap waste to the list of compost operations that are subject to permit requirements.

Proposed new §332.3(a)(3)(A) adds that proposed operations that compost grease trap waste in any amount are subject to permit requirements.

Proposed new §332.3(a)(3)(B) adds that existing operations already authorized through a registration to compost grease trap waste in any amount are subject to permit requirements. Also added is the time frame for existing operations to comply with permit requirements, and the time limit for existing operations to cease operations if they do not comply with the required permit requirements.

Proposed §332.3(b)(4) is deleted to remove operations that compost grease trap waste from the list of compost operations that are subject to registration requirements and subsequent paragraphs (5) - (7) have been renumbered.

Proposed §332.8(d)(2), Air Quality Requirements, deletes grease trap waste from the list of wastes subject to air quality requirements for facilities that are subject to registration requirements. These air quality requirements for grease trap waste are moved to the amended section for air quality requirements for facilities subject to permits.

Proposed §332.8(e)(2) adds grease trap waste to the list of wastes subject to air quality requirements for facilities that are subject to permit requirements.

Proposed §332.31(a)(4), Definition of and Requirements for Registered Facilities, is deleted to remove operations that compost grease trap waste from the list of operations that are subject to registration requirements and subsequent paragraphs (5) - (7) have been renumbered.

Proposed §332.37(2), Operational Requirements, deletes grease trap waste from the list of wastes subject to groundwater protection requirements for facilities that are subject to registration requirements. These groundwater protection requirements are moved to the amended section for groundwater protection

requirements for facilities subject to permits. The paragraph also replaces the word "shall" with the word "must" as appropriate.

Proposed §332.41(a)(3), Definition, Requirements, and Application Processing for a Permit Facility, adds operations that compost grease trap waste to the list of compost operations that are subject to permit requirements.

Proposed §332.47, Permit Application Preparation, replaces the word "shall" with the word "must" or "will" as appropriate.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that, for the first five-year period the proposed rules are in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The proposed rules implement House Bill 1791, 78th Legislature, 2003, and require that facilities that compost grease trap waste be permitted by the commission. Currently, facilities that compost grease trap waste are authorized by the commission through registration.

Existing agency resources will be used to implement the proposed rules, and no significant fiscal implications are anticipated for the commission for any additional enforcement, inspection, permitting, or guidance activities. Revenue to the agency is not expected to be impacted as there is no permit application fee and solid waste disposal fee revenue is not expected to increase or decrease significantly from current levels.

At this time, there are three registered facilities that compost grease trap waste and two facilities have registration applications pending for composting grease trap waste. None of these facilities or proposed facilities are owned or operated by units of state or local government, and therefore, no fiscal implications are anticipated for units of state or local government to implement the proposed rules.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed rules will be compliance with state law and more effective regulation and control of municipal solid waste, particularly grease trap waste.

Fiscal implications are anticipated to businesses or individuals as a result of the implementation or enforcement of the proposed rules.

The proposed rules would require individuals or businesses who compost grease trap waste to obtain a permit rather than a registration from the agency. At this time, there are three registered facilities that compost grease trap waste and two facilities have registration applications pending for composting grease trap waste. Under the proposed rules, existing facilities must receive a permit from the agency on or before June 1, 2004.

Costs to obtain a permit in lieu of a registration are anticipated to be considerably higher for affected facilities. There is a wide range of costs associated with obtaining a permit for this type of facility depending on size and location of the facility. Additional costs for preparing a permit application may be attributed primarily to professional services costs for the development and support of the permit application.

As part of the permit application, a geological report is required detailing characteristics of subsurface soils for the proposed site. This report will require soil samples to be obtained by boring into the area of the facility to determine the characteristics of the subsurface soils. The number and depth of these soil samples will depend on the acreage of a facility. It is estimated that samples will cost between $1,000 - $5,000 each, for every five acres. Larger facilities will require more samples and more time spent at the site and, therefore, have higher costs.

The proposed rules also require that certain documents, reports, and drawings in a permit application be prepared by a licensed engineer. The engineering requirements of the application may require a large number of work hours. Engineering and geological contract costs for a permit are estimated to be as high as $250,000.

Fees for legal proceedings could be the most costly component of the permit application, and would vary widely depending upon the complexity and length of the permit application process. Whether a permit application is contested could have significant fiscal implications for a proposed facility. A contested case for a permit application may increase costs as much as $500,000 over the costs for an uncontested permit application, although the costs could also be significantly less, depending upon the length and complexity of the permit application process. The location of a facility can impact the costs for a permit. If the facility is located where there is local opposition, the costs of a contested application are anticipated to be higher.

Agency program staff have estimated that current costs for a facility to obtain a registration may range from $35,000 to $250,000, depending upon the size and location of the proposed facility. Agency staff further estimate that the conversion to permits may increase costs to affected facilities up to $750,000, depending upon any costs associated with a contested case hearing. Uncontested permit applications would be expected to cost considerably less, and depending upon the location and size of the facility, could be estimated to cost approximately $250,000.

Additional costs to regulated facilities would be expected to be passed on to entities that use their services, generally restaurants or other facilities that have grease trap waste to be disposed of. At this time, there are approximately 20 landfills, 12 Type V grease and grit trap facilities, and 30 transfer stations in the state that are authorized to accept this type of waste. It is not known how the proposed rules and the resulting higher potential costs for facility authorization would affect competition between these entities, if at all.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses that own or operate grease trap composting facilities.

The proposed rules would require individuals or businesses who compost grease trap waste to obtain a permit rather than a registration from the agency. At this time, there are three registered facilities that compost grease trap waste and two facilities have registration applications pending for composting grease trap waste. Under the proposed rules, existing facilities must receive a permit from the agency on or before June 1, 2004. It is estimated

that all five facilities are small or micro-businesses and that there will be significant costs to comply with the proposed rules.

Agency program staff have estimated that current costs for a facility to obtain a registration may range from $35,000 to $250,000, depending upon the size and location of the proposed facility. Agency staff further estimate that the proposed rules may increase costs to affected facilities by as much as $750,000, depending upon any costs associated with a contested case hearing. A contested case for a permit application may increase costs as much as $500,000 over the costs for an uncontested permit application, depending upon the length and complexity of the permit application process. Uncontested permit applications would be expected to cost considerably less, and depending upon the location and size of the facility, could be estimated to be approximately $250,000.

The following is an analysis of the cost per employee for small or micro-businesses affected by the proposed rules. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. Owners of grease trap composting facilities with 100 or fewer employees could incur additional costs for obtaining a permit of up to $750,000 to comply with the proposed rules. Costs for these facilities are estimated to be between $250,000 and $750,000 or between $2,500 and $7,500 per employee. A micro-business with 20 or less employees would incur estimated additional costs of between $12,500 and $37,500 per employee. The projected costs for affected facilities is the same for small businesses as for larger businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the proposed rules is to more closely regulate the commercial composting of grease trap waste to improve environmental protection. It is estimated that only three existing and two proposed facilities will be affected by these proposed rules. Therefore, it is not anticipated that the proposed rules will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that these proposed rules do not meet the definition of a major environmental rule.

Furthermore, even if the proposed rules did meet the definition of a major environmental rule, the proposed rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rules do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the proposed rules do not exceed an express requirement of state law but instead implement the statutory requirement for permitting grease trap composters. Third, there is no delegation agreement that would be exceeded by these proposed rules because none relates to this subject matter area. Fourth, the commission proposes these rules under the rulemaking direction of House Bill 1791, 78th Legislature, 2003, amending Texas Health and Safety Code, §361.428, and not solely under the commission's general powers. The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to more closely regulate the commercial composting of grease trap waste to improve environmental protection. The proposed rules would substantially advance this stated purpose by requiring that grease trap waste can only be composted at a permitted facility instead of a registered facility.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property because the proposed rules do not affect real property.

In particular there are no burdens imposed on private real property, and the proposed rules would improve the commission's ability to ensure proper management of grease trap waste composting operations. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, these proposed rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found the rules are identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed these proposed rules for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. The commission determined that the proposed rules concern requirements for a person commercially composting grease trap waste to obtain a permit instead of a registration, which is administrative and procedural in nature; does not impact any CMP goals and policies; will have no substantive effect on commission actions subject to the

CMP; and promulgation and enforcement of the proposed rules will not violate (exceed) any standards identified in the applicable CMP goals and policies. Therefore, these proposed rules are consistent with CMP goals and policies. The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-045-332-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §332.3, §332.8

STATUTORY AUTHORITY

The amendments are proposed under Texas Health and Safety Code, §361.428, as amended by House Bill 1791, 78th Legislature, 2003, which prohibits the commercial composting of grease trap waste without a permit; §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.061, which authorizes the commission to issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste under this chapter; and §361.024, which provides the commission with rulemaking authority.

The proposed amendments implement Texas Health and Safety Code, §361.428, as amended by House Bill 1791, 78th Legislature, 2003.

§332.3. Applicability.

(a) Permit required. The following compost operations are subject to the general requirements found in §332.4 of this title (relating to General Requirements), and the requirements set forth in Subchapters D - G of this chapter [~~D, E, F, and G of this title~~] (relating to Operations Requiring a Permit; Source-Separated Recycling [~~Recycle~~]; [~~and~~] Household Hazardous Waste Collection; and End-Product Standards), and the air quality requirements in §332.8 of this title (relating to Air Quality Requirements). These operations [~~facilities~~] are required to obtain a permit from the commission under [~~pursuant to~~] Chapters 305 and 281 of this title (relating to Consolidated Permits; and Applications [~~and 281 of this title~~ (~~relating to Application~~] Processing): [~~.~~]

(1) operations [~~Operations~~] that compost mixed municipal solid waste; [~~.~~]

(2) operations [~~Operations~~] that add any amount of mixed municipal solid waste as a feedstock in the composting process; and [~~.~~]

(3) operations that compost grease trap waste.

(A) All proposed operations that compost any amount of grease trap waste must apply for a permit and must have a permit prior to operating.

(B) Existing facilities that have received a registration to authorize operations to compost any amount of grease trap waste must apply for a permit. Operating grease trap waste composting facilities authorized to operate by a registration may continue to operate if they file a timely permit application and receive a permit not later than June 1, 2004. Existing facilities that do not receive a permit on or before June 1, 2004, must discontinue operations not later than June 1, 2004.

(b) Registration required. The following compost operations are subject to the requirements [~~of the General Requirements~~] found in §332.4 of this title [(~~relating to General Requirements~~)], the requirements set forth in Subchapters C and G of this chapter [~~title~~] (relating to Operations Requiring a Registration; and End-Product Standards), and the air quality requirements in §332.8 of this title: [(~~relating to Air Quality Requirements~~).]

(1) operations [~~Operations~~] that compost municipal sewage sludge, except those facilities that compost municipal sewage sludge with mixed municipal solid waste; [~~.~~]

(2) operations [~~Operations~~] that compost positively-sorted organic materials from the municipal solid waste stream; [~~.~~]

(3) operations [~~Operations~~] that compost source-separated organic materials not exempted under subsection (d) of this section; [~~.~~]

[~~(4) Operations that compost grease trap waste.~~]

(4) [~~(5)~~] operations [~~Operations~~] that compost disposable diapers or paper products soiled by human excreta; [~~.~~]

(5) [~~(6)~~] operations [~~Operations~~] that compost the sludge byproduct generated from the production of paper if the executive director determines that the feedstock is appropriate under [~~pursuant to~~] §332.33 of this title (relating to Required Forms, Applications, Reports, and Request to Use the Sludge Byproduct of Paper Production); and [~~.~~]

(6) [~~(7)~~] operations [~~Operations~~] that incorporate any of the materials set forth in paragraphs (1) - (5) [~~(6)~~] of this subsection with source-separated yard trimmings, clean wood material, vegetative material, paper, manure, meat, fish, dairy, oil, grease materials, or dead animal carcasses.

(c) Operations requiring notification. The following operations are subject to all requirements set forth in Subchapter B of this chapter [~~title~~] (relating to Operations Requiring A Notification), the general requirements found in §332.4 of this title [(~~relating to General Requirements~~)], and the air quality requirements in §332.8 of this title [(~~relating to Air Quality Requirements~~)]:

(1) operations [~~Operations~~] that compost any source-separated meat, fish, dead animal carcasses, oils, greases, or dairy materials; and [~~.~~]

(2) operations [~~Operations~~] that incorporate any of the materials set forth in paragraph (1) of this subsection with source-separated yard trimmings, clean wood material, vegetative material, paper, or manure.

(d) Operations exempt from facility notification, registration, and permit requirements. The following operations are subject to the general requirements found in §332.4 of this title [(~~relating to General Requirements~~)], [~~and~~] the air quality requirements in §332.8 of this title [(~~relating to Air Quality Requirements~~)], and are exempt from notification, registration, and permit requirements found in Subchapters B - D of this chapter [~~Subchapter B of this chapter (relating to Operations Requiring Notification), Subchapter C of this chapter (relating to Requirements for Registered Facilities), and Subchapter D of this chapter (relating to Permit Required)~~]. Operations under paragraphs (1) and (3) of this subsection are subject to the requirements of an exempt recycling facility under §328.4 and §328.5 of this title (relating to Limitations on Storage of Recyclable Materials; and Reporting and Recordkeeping Requirements): [~~.~~]

(1) operations [~~Operations~~] that compost only materials listed in subparagraphs (A) and (B) of this paragraph: [~~.~~]

(A) source-separated [~~Source-separated~~] yard trimmings, clean wood material, vegetative material, paper, and manure; [~~.~~]

(B) source-separated [~~Source-separated~~] industrial materials listed in §332.4(10) of this title [~~(relating to General Requirements)~~] excluding those items listed in §332.4(10)(A), (F) - (H) [~~(F), (G), (H)~~], and (J) of this title; [~~.~~]

(2) agricultural [~~Agricultural~~] operations that generate and compost agricultural materials on-site; [~~.~~]

(3) mulching [~~Mulching~~] operations; [~~.~~]

(4) land [~~Land~~] application of yard trimmings, clean wood materials, vegetative materials, and manure at rates below or equal to agronomic rates as determined by the Texas Agricultural Extension Service; [~~.~~]

(5) application [~~Application~~] of paper that is applied to land for use as an erosion control or a soil amendment; and [~~.~~]

(6) on-site [~~On-site~~] composting of industrial solid waste at a facility that is in compliance with §335.2 of this title (relating to Permit Required) and §335.6 of this title (relating to Notification Requirements).

§332.8. Air Quality Requirements.

(a) General requirements.

(1) Any composting or mulching operation which has existing authority under the Texas Clean Air Act does not have to meet the air quality criteria of this subchapter. Under [~~Pursuant to the~~] Texas Clean Air Act, §382.051, any new composting or mulching operation which meets all of the applicable requirements of this subchapter is [~~hereby~~] entitled to an air quality standard permit authorization under this subchapter in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(2) Those composting or mulching operations which would otherwise be required to obtain air quality authorization under Chapter 116 of this title [~~(relating to Control of Air Pollution by Permits for New Construction or Modification)~~], which cannot satisfy all of the requirements of this subchapter, shall apply for and obtain air quality authorization under [~~pursuant to~~] Chapter 116 of this title [~~(relating to Control of Air Pollution by Permits for New Construction or Modification)~~] in addition to any notification, registration, or permit required in this subchapter.

(3) Any composting or mulching operation authorized under this chapter which is a new major source or any modification which constitutes a major modification under nonattainment review or prevention of significant deterioration [~~Prevention of Significant Deterioration~~] review as amended by the Federal Clean Air Act amendments of 1990, and regulations promulgation thereunder, is [~~shall be~~] subject to the requirements of Chapter 116 of this title [~~(relating to Control of Air Pollution by Permits for New Construction or Modification)~~], in addition to any notification, registration, or permit required in this chapter.

(4) Composting facilities that do not wish to comply with the requirements of this section, are required to apply for and obtain air quality authorization under Chapter 116 of this title [~~(relating to Control of Air Pollution by Permits for New Construction or Modification)~~]. Once a person has applied for and obtained air quality authorization under Chapter 116 of this title [~~(relating to Control of Air Pollution by Permits for New Construction or Modification)~~], the person is exempt from the air quality requirements of this chapter.

(5) No person may concurrently hold an air quality permit issued under Chapter 116 of this title [~~(relating to Control of Air Pollution by Permits for New Construction or Modification)~~] and an air quality standard permit authorized under this chapter for composting or mulching operations at the same site.

(6) Composting or mulching operations which have authorization under this chapter shall comply with the general requirements in §332.4 of this title (relating to General Requirements), and subsections (b), (c), (d), or (e) of this section. [~~; and~~]

(7) (No change.)

(b) Exempt operations. Composting and mulching operations that are considered exempt operations under [~~pursuant to~~] §332.3(d) of this title (relating to Applicability), and that meet the following requirements are [~~hereby~~] entitled to an air quality standard permit.

(1) If the total volume of materials to be mulched and/or composted, including in-process and processed materials at any time is greater than 2,000 cubic yards, the setback distance from all property boundaries to the edge of the area receiving, processing, or storing feedstock or finished product must [~~shall~~] be at least 50 feet.

(2) - (4) (No change.)

(5) If there are any changes to the composting or mulching operation that would reclassify it from an exempt operation to a notification, registration, or permit facility as authorized under §332.3 of this title [~~(relating to Applicability)~~], the operation shall obtain an air quality standard permit for a notification, registered, or permitted composting operation.

(c) Notification operations. Composting operations required to notify under [~~pursuant to~~] §332.3(c) of this title [~~(relating to Applicability)~~] which meet the following requirements are [~~hereby~~] entitled to an air quality standard permit.

(1) The setback distance from all property boundaries to the edge of the area receiving, processing, or storing feedstock or finished product must [~~shall~~] be at least 50 feet.

(2) (No change.)

(3) Prior to receiving any material with a high odor potential such as, but not limited to, dairy material feedstocks, meat, fish, and oil and grease feedstocks, the operator shall insure that there is an adequate volume of bulking material to blend with/cover the material, and shall begin processing the material in a manner that prevents nuisances.

(4) - (5) (No change.)

(6) If there are any changes to the composting or mulching operation that would reclassify it from a notification operation to a registration or permit operation as authorized under §332.3 of this title [~~(relating to Applicability)~~], the operation shall obtain an air quality standard permit for a registered or permitted composting operation.

(d) Registered operations. Composting operations required to obtain a registration under [~~pursuant to~~] §332.3(b) of this title that [~~(relating to Applicability) which~~] meet the following requirements are [~~hereby~~] entitled to an air quality standard permit.

(1) (No change.)

(2) Prior to receiving any material with a high odor potential such as, but not limited to, dairy material feedstocks, sewage sludge, meat, fish, and oil and grease feedstocks, [~~and grease trap waste,~~] the operator shall insure that there is an adequate volume of bulking material to blend with or cover [~~with/cover~~] the material,

and shall begin processing the material in a manner that prevents nuisances.

(3) - (5) (No change.)

(6) If there are any changes to the composting or mulching operation that would reclassify it from a registration operation to a permit operation as authorized under §332.3 of this title [~~(relating to Applicability)~~], the operation shall obtain an air quality standard permit for a permitted composting operation.

(e) Permit operations. Composting operations required to obtain a permit under [~~pursuant to~~] §332.3(a) of this title that [~~(relating to Applicability) which~~] meet the following requirements are [~~hereby~~] entitled to an air quality standard permit.

(1) (No change.)

(2) Prior to receiving any material with a high odor potential such as, but not limited to, dairy material feedstocks, sewage sludge, meat, fish, oil and grease feedstocks, grease trap waste, and municipal solid waste, the operator shall insure that there is an adequate volume of bulking material to blend with or cover [~~with/cover~~] the material, and shall begin processing the material in a manner that prevents nuisances.

(3) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304827
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 239-4712

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SUBCHAPTER C. OPERATIONS REQUIRING A REGISTRATION

30 TAC §332.31, §332.37

STATUTORY AUTHORITY

The amendments are proposed under Texas Health and Safety Code, §361.428, as amended by House Bill 1791, 78th Legislature, 2003, which prohibits the commercial composting of grease trap waste without a permit; §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.061, which authorizes the commission to issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste under this chapter; and §361.024, which provides the commission with rulemaking authority.

The proposed amendments implement Texas Health and Safety Code, §361.428, as amended by House Bill 1791, 78th Legislature, 2003.

§332.31. Definition of and Requirements for Registered Facilities.

(a) Definition of registered facilities. The following operations are subject to the requirements of this subchapter: [.]

(1) operations [~~Operations~~] that compost municipal sewage sludge, except those facilities that compost municipal sewage sludge with mixed municipal solid waste; [.]

(2) operations [~~Operations~~] that compost positively-sorted organic materials from the municipal solid waste stream; [.]

(3) operations [~~Operations~~] that compost source-separated organic materials not exempted under §332.3(d) of this title (relating to Applicability); [.]

[~~(4) Operations that compost grease trap waste.~~]

(4) [~~(5)~~] operations [~~Operations~~] that compost disposable diapers or paper products soiled by human excreta; [.]

(5) [~~(6)~~] operations [~~Operations~~] that compost the sludge byproduct generated from the production of paper if the executive director determines that the feedstock is appropriate under [~~pursuant to~~] §332.33 of this title (relating to Required Forms, Applications, Reports, and Request To Use the Sludge Byproduct of Paper Production); and [.]

(6) [~~(7)~~] operations [~~Operations~~] that incorporate any of the materials set forth in paragraphs (1) - (5) [~~(6)~~] of this subsection with source-separated yard trimmings, clean wood material, vegetative material, paper, manure, meat, fish, dairy, oil, grease materials, or dead animal carcasses.

(b) Requirements for registered facilities. The operations listed in subsection (a) of this section are subject to the requirements [~~of the General Requirements~~] found in §332.4 of this title (relating to General Requirements), the requirements set forth in this subchapter, the requirements set forth in Subchapter G of this chapter (relating to End-Product Standards) and the air quality requirements set forth in §332.8 of this title (relating to Air Quality Requirements).

§332.37. Operational Requirements.

The operation of the facility must [~~shall~~] comply with all of the following operational requirements.

(1) Protection of surface water. The facility must [~~shall~~] be constructed, maintained, and operated to manage run-on and run-off during a 25-year, 24-hour rainfall event and must [~~shall~~] prevent discharge into waters in the state of feedstock material, including, but not limited to, in-process and/or processed materials. Any waters coming into contact with feedstock, in-process, and processed materials must [~~shall~~] be considered leachate. Leachate must [~~shall~~] be contained in retention facilities until reapplied on piles of feedstock, in-process, or unprocessed materials. The retention facilities must [~~shall~~] be lined and the liner must [~~shall~~] be constructed in compliance with paragraph (2) of this section. Leachate may be treated and processed at an authorized facility or as authorized by a Texas Pollutant Discharge Elimination System [~~an NPDES~~] permit. The use of leachate in any processing must [~~shall~~] be conducted in a manner that does not contaminate the final product.

(2) Protection of groundwater. The facility must [~~shall~~] be designed, constructed, maintained, and operated to protect groundwater. Facilities that compost municipal sewage sludge, [~~grease trap waste,~~] disposable diapers, and/or the sludge byproduct of paper mill production must [~~shall~~] install and maintain a liner system complying with the provisions of subparagraph (A), (B), or (C) of this paragraph. The liner system must [~~shall~~] be provided where receiving, mixing, composting, post-processing, screening, or [~~and~~] storage areas would be in contact with the ground or in areas where leachate, contaminated materials, contaminated product, or contaminated water is stored or retained. The application must [~~shall~~] demonstrate the facility is designed [~~so as not~~] to prevent contamination or degradation of [~~contaminate~~] the groundwater [~~and so as to protect the existing groundwater~~

~~quality from degradation~~]. For the purposes of these sections, protection of the groundwater includes the protection of perched water or shallow surface infiltration. The lined surface must [~~shall~~] be covered with a material designed to withstand normal traffic from the composting operations. At a minimum, the lined surface must [~~shall~~] consist of soil, synthetic, or an alternative material that is equivalent to two feet of compacted clay with a hydraulic conductivity of 1 x 10^{-7} centimeters per second or less.

(A) Soil liners shall have more than 30% passing a number 200 sieve, have a liquid limit greater than 30%, and a plasticity index greater than 15.

(B) (No change.)

(C) Alternative designs shall utilize [~~An alternative design that utilizes~~] an impermeable liner (such as concrete).

(3) - (6) (No change.)

(7) Site sign. The facility shall have a sign at the entrance indicating the type of facility, the registration number, hours of operation, and the allowable feedstocks.

(8) - (9) (No change.)

(10) Prohibited substances. Fungicides, herbicides, insecticides, or other pesticides that contain constituents listed in 40 Code of Federal Regulations [~~CFR~~] Part 261, Appendix VIII-Hazardous Constituents or on the Hazardous Substance List as defined in the CERCLA [~~Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)~~] shall not be applied to or incorporated into feedstocks, in-process materials, or processed materials.

(11) End-product standards.

(A) (No change.)

(B) All other registered facilities. The operator shall meet compost testing requirements set forth in §332.71 of this title (relating to Sampling and Analysis Requirements for Final Product), final product grades set forth in §332.72 of this title [~~(relating to Final Product Grades)~~], and label all materials which are sold or distributed as set forth in §332.74 of this title (relating to Compost [~~Final Product~~] Labelling Requirements).

(12) Certified operator. The operator shall employ at least one TCEQ-certified [~~TNRCC-certified~~] compost operator within six months from the adoption of this rule [~~title~~], the initiation of operations at the compost facility, or the establishment of the compost certification program, which ever occurs later, and a TCEQ-certified [~~TNRCC-certified~~] compost operator shall routinely be available on-site [~~on site~~] during the hours of operation.

(13) Chemical release. The operator of a compost facility shall address the release of a chemical of concern from a compost facility to any environmental media under the requirements of Chapter 350 of this title (relating to Texas Risk Reduction Program) to perform the corrective action.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304828

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 239-4712

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SUBCHAPTER D. OPERATIONS REQUIRING A PERMIT

30 TAC §332.41, §332.47

STATUTORY AUTHORITY

The amendments are proposed under Texas Health and Safety Code, §361.428, as amended by House Bill 1791, 78th Legislature, 2003, which prohibits the commercial composting of grease trap waste without a permit; §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.061, which authorizes the commission to issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste under this chapter; and §361.024, which provides the commission with rulemaking authority.

The proposed amendments implement Texas Health and Safety Code, §361.428, as amended by House Bill 1791, 78th Legislature, 2003.

§332.41. Definition, Requirements, and Application Processing for a Permit Facility.

(a) Definition of permitted facilities. The following operations are subject to the requirements of this subchapter: [.]

(1) operations [~~Operations~~] that compost mixed municipal solid waste not in accordance with §332.31 of this title (relating to Definition of and Requirements for Registered Facilities); [.]

(2) operations [~~Operations~~] that add any amount of mixed municipal solid waste as a feedstock in the composting process; and [.]

(3) operations that compost grease trap waste.

(b) Requirements for permitted facilities. The operations listed in subsection (a) of this section are subject to the general requirements found in §332.4 of this title (relating to General Requirements), and the requirements set forth in this subchapter, the requirements set forth in Subchapters E - G [~~E, F, and G~~] of this chapter (relating to Source-Separated Recycling; [~~and~~] Household Hazardous Waste Collection; and End-Product Standards), and the air quality requirements set forth in §332.8 of this title (relating to Air Quality Requirements).

(c) Processing of application for permit facility [~~Application for Permit Facility~~].

(1) Public notice [~~Notice~~].

(A) When an application is administratively complete, the chief clerk shall mail notice to adjacent landowners, residents, and businesses. The chief clerk also shall mail notice to other affected landowners, residents, and businesses, as directed by the executive director.

(B) When an application is technically complete, the chief clerk shall mail notice to adjacent landowners, residents, and businesses. The chief clerk shall also mail notice to other affected landowners, residents, and businesses, as directed by the executive director. The applicant shall publish notice in the county in which the facility is located, and in adjacent counties. The published notice shall be published once a week for three weeks, with the first publication occurring no earlier than 30 days before any hearing. The applicant should attempt to obtain publication in a Sunday edition of a newspaper. The notice shall explain the method for submitting a request for hearing or a protest.

(C) (No change.)

(2) Other chapters. A facility must obtain a permit from the commission under [~~pursuant to~~] Chapters 305 and 281 of this title (relating to Consolidated Permits; and Applications [~~)~~ ~~and 281 of this title (relating to Application~~] Processing). A permit may be issued under Chapter 50, Subchapter G [~~Chapter 263, Subchapter A~~] of this title (relating to Action [~~Final Approval~~] by the Executive Director). The public notice requirements of Chapters 305 and 281 of this title and Chapter 39 of this title (relating to Public Notice) [~~305, 281, and 263~~] apply to the extent consistent with this subchapter.

§332.47. Permit Application Preparation.

To assist the commission in evaluating the technical merits of a compost facility, an applicant subject to this chapter shall submit a site development plan [~~shall be prepared and submitted~~] to the commission along with Compost Form Number 3. The site development plan must [~~shall~~] be sealed by a registered professional engineer in accordance with the provisions of 22 TAC §131.166 (relating to Engineers' Seals) [~~§131.138 (Engineers' Seals)~~]. If the site development plan is submitted in a three-ring [~~three ring~~] binder or in a format that allows the removal or insertion of individual pages, it will [~~shall~~] not be considered a bound document. The site development plan must [~~shall~~] contain all of the following information.

(1) Title page. A title page shall show the name of the project, the county (and city if applicable) in which the proposed project is located, the name of the applicant, the name of the engineer, the date the application was prepared, and the latest date the application was revised.

(2) Table of contents. A table of contents shall be included which lists the main sections of the plan, any requested variances, and includes page numbers.

(3) Engineer's appointment. An engineer's appointment which consists of a letter from the applicant to the executive director identifying the consulting engineering firm responsible for the submission of the plan, specifications, and any other technical data to be evaluated by the commission regarding the project.

(4) Land use [~~Use~~]. To assist the executive director in evaluating the impact of the facility on the surrounding area, the applicant shall provide the following:

(A) - (B) (No change.)

(C) proximity to residences and other uses (e.g., schools, churches, cemeteries, historic structures, historic sites, archaeologically significant sites, sites having exceptional aesthetic quality, parks, recreational sites, recreational facilities, licensed day care, etc.). Give the approximate number of residences and business establishments within one mile of the proposed facility including the distances and directions to the nearest residences and businesses;

(D) (No change.)

(E) a constructed land use map showing the land use, zoning, residences, businesses, schools, churches, cemeteries, historic structures, historic sites, archaeologically significant sites, sites having exceptional aesthetic quality, licensed day care centers, parks, recreational sites and recreational facilities within one mile of the facility, and wells within 500 feet of the facility.

(5) Access. To assist the executive director in evaluating the impact of the facility on the surrounding roadway system, the applicant shall provide the following:

(A) data [~~Data~~] on the roadways, within one mile of the facility, used to access the facility. The data shall include dimensions, surfacing, general condition, capacity and load limits;

(B) data [~~Data~~] on the volume of vehicular traffic on access roads within one mile of the proposed facility. The applicant shall include both existing and projected traffic during the life of the facility (for projected include both traffic generated by the facility and anticipated increase without the facility);

(C) an [~~An~~] analysis of the impact the facility will have on the area roadway system, including a discussion on any mitigating measures (turning lanes, roadway improvements, intersection improvements, etc.) proposed with the project; and

(D) an [~~An~~] access roadway map showing all area roadways within a mile of the facility. The data and analysis required in subparagraphs (A) - (C) [~~(A), (B), and (C)~~] of this paragraph shall be keyed to this map.

(6) Facility development [~~Development~~]. To assist the executive director in evaluating the impact of the facility on the environment, the applicant shall provide the following.

(A) Surface water protection plan. The surface water protection plan shall be prepared by a registered professional engineer. At a minimum, the applicant shall provide all of the following: [~~.~~]

(i) [~~Present~~] a design for a run-on control system capable of preventing flow onto the facility during the peak discharge from at least a 25-year, 24-hour rainfall event; [~~.~~]

(ii) [~~Present~~] a design for a run-off management system to collect and control at least the peak discharge from the facility generated by a 25-year 24-hour rainfall event; [~~.~~]

(iii) [~~Present~~] a design for a contaminated water collection system to collect and contain all leachate. If the design uses leachate for any processing, the applicant shall clearly demonstrate that such use will not result in contamination of the final product; and [~~.~~]

(iv) [~~Present~~] drainage calculations as follows.

(I) - (III) (No change.)

(IV) Temporary and permanent erosion control measures shall be discussed; [~~.~~]

(v) drainage maps and drainage plans [~~Drainage Maps and Drainage Plans shall be provided~~] as follows: [~~.~~]

(I) an [~~An~~] off-site topographic drainage map showing all areas which contribute to the facilities run-on. The map shall delineate the drainage basins and sub-basins, show the direction of flow, time of concentration, basin area, rainfall intensity, and flow rate. This map shall also show all creeks, rivers, intermittent streams, lakes, bayous, bays, estuaries, arroyos, and other surface waters in the state; [~~.~~]

(II) a [~~A~~] pre-construction on-site drainage map. The map shall delineate the drainage basins and sub-basins, show the direction of flow, time of concentration, basin area, rainfall intensity, and flow rate; [~~.~~]

(III) a [~~A~~] post-construction on-site drainage map. The map shall delineate the drainage basins and sub-basins, show the direction of flow, time of concentration, basin area, rainfall intensity, and flow rate; [~~.~~]

(IV) a [~~A~~] drainage facilities map. The map shall show all proposed drainage facilities (ditches, ponds, piping, inlets, outfalls, structures, etc.) and design parameters (velocities, cross-section areas, grades, flowline elevations, etc.). Complete cross-sections of all ditches and ponds shall be included; [~~.~~]

(V) a [~~A~~] profile drawing. The drawing shall include profiles of all ditches and pipes. Profiles shall include top of bank, flowline, hydraulic grade, and existing groundline. Ditches and swells shall have a minimum of one foot of freeboard; [~~.~~]

(VI) a [~~A~~] floodplain and wetlands map. The map shall show the location and lateral extent of all floodplains and wetlands on the site and on lands within 500 feet of the site; and [~~.~~]

(VII) an [~~An~~] erosion control map which indicates placement of erosion control features on the site.

(B) Geologic/hydrogeologic [~~Geologic/Hydrogeologic~~] report. The geologic/hydrogeologic report shall be prepared by an engineer or qualified geologist/hydrogeologist. The applicant shall include discussion and information on all of the following:

(i) (No change.)

(ii) a [~~A~~] description of the geologic processes active in the vicinity of the facility. This description shall include an identification of any faults and/or subsidence in the area of the facility; [~~.~~]

(iii) a [~~A~~] description of the regional aquifers in the vicinity of the facility based upon published and open-file sources. The section shall provide:

(I) - (IV) (No change.)

(V) the present use of ground water withdrawn from aquifers in the vicinity of the facility; [~~.~~]

(iv) subsurface [~~Subsurface~~] investigation report. This report shall describe all borings drilled on-site to test soils and characterize ground water and shall include a site map drawn to scale showing the surveyed locations and elevations of the boring. Boring logs shall include a detailed description of materials encountered including any discontinuities such as fractures, fissures, slickensides, lenses, or seams. Each boring shall be presented in the form of a log that contains, at a minimum, the boring number; surface elevation and location coordinates; and a columnar section with text showing the elevation of all contacts between soil and rock layers description of each layer using the Unified Soil Classification, color, degree of compaction, and moisture content. A key explaining the symbols used on the boring logs and the classification terminology for soil type, consistency, and structure shall be provided.

(I) A sufficient number of borings shall be performed to establish subsurface stratigraphy and to determine geotechnical properties of the soils and rocks beneath the facility. The number of borings necessary can only be determined after the general characteristics of a site are analyzed and will vary depending on the heterogeneity of subsurface materials. The minimum number of borings required for a site shall be three for sites of five acres or less, and for sites larger than five acres the required number of borings shall be three borings plus one boring for each additional five acres or fraction thereof. The boring plan shall be approved by the executive director prior to performing the bores.

(II) - (VI) (No change.)

(v) Groundwater [~~Ground water~~] investigation report. This report shall establish and present the groundwater [~~ground water~~] flow characteristics at the site which shall include groundwater [~~ground water~~] elevation, gradient, and direction of flow. The flow characteristics and most likely pathway(s) for pollutant migration shall be discussed in a narrative format and shown graphically on a piezometric contour map. The groundwater [~~ground water~~] data shall be collected from piezometers installed at the site. The minimum number of piezometers required for the site shall be three for sites of five acres or less, for sites greater than five acres the total number of piezometer required shall be three piezometer plus one piezometer for each additional five acres or fraction thereof.

(C) Groundwater protection plan. The application shall demonstrate the facility is designed so as not to contaminate the groundwater and so as to protect the existing groundwater quality from degradation. For the purposes of these sections, protection of the groundwater includes the protection of perched water or shallow surface infiltration. As a minimum, groundwater protection shall consist of all of the following.

(i) Liner system. All feedstock receiving, mixing, composting, post-processing, screening, and storage areas shall be located on a surface which is adequately lined to control seepage. The lined surface shall be covered with a material designed to withstand normal traffic from the composting operations. At a minimum, the lined surface shall consist of soil, synthetic, or an alternative material that is equivalent to two feet of compacted clay with a hydraulic conductivity of 1×10^{-7} centimeters per second or less.

(I) Soil liners shall have more than 30% passing a number 200 sieve, have a liquid limit greater than 30%, and a plasticity index greater than 15. [~~;~~]

(II) Synthetic liners shall be a membrane with a minimum thickness of 20 mils. [~~; or~~]

(III) Alternative designs shall utilize [~~An alternative design that utilizes~~] an impermeable liner (such as concrete).

(ii) Groundwater [~~Ground water~~] monitor system. The groundwater [~~ground water~~] monitoring system shall be designed and installed such that the system will reasonably assure detection of any contamination of the groundwater [~~ground water~~] before it migrates beyond the boundaries of the site. The monitoring system shall be designed based upon the information obtained in the "Groundwater [~~Ground water~~] investigation report" required by subparagraph (B)(v) [~~(6)(B)(v)~~] of this paragraph.

(I) (No change.)

(II) A groundwater sampling program shall provide four background ground water samples of all monitor wells within 24 months from the date of the issuance of the permit. The background levels shall be established from samples collected from each well at least once during each of the four calendar quarters: January - March; April - June; July - September; and October - December. Samples from any monitor well shall not be collected for at least 45 days following collection of a previous sample, unless a replacement sample is necessary. At least one sample per well shall be collected and submitted to a laboratory for analysis prior to accepting any material for processing at the facility. Background samples shall be analyzed for the parameters as follows:

(-a-) heavy [~~Heavy~~] metals; arsenic, copper, mercury, barium, iron, selenium, cadmium, lead, chromium, and zinc;

(-b-) other [~~Other~~] parameters: calcium, magnesium, sodium, carbonate, bicarbonate, sulphate, fluoride, nitrate (as N), total dissolved solids, phenolphthalein alkalinity as $CaCo_3$,

alkalinity as $CaCo_3$, hardness as $CaCo_3$, pH, specific conductance, anion-cation balance, groundwater elevation (MSL), and total organic carbon (TOC) (four replicates/sample); and

(-c-) after [~~After~~] background values have been determined the following indicators shall be measured at a minimum of 12 month intervals: TOC (four replicates), iron, manganese, pH, chloride, ground water elevation (MSL), and total dissolved solids. After completion of the analysis, a copy shall be sent to the executive director and a copy shall be maintained on-site.

(D) Facility plan and facility layout. The facility plan and facility layout must [~~shall~~] be prepared by a registered professional engineer. All proposed facilities, structures, and improvements must [~~shall~~] be clearly shown and annotated on this drawing. The plan must [~~shall~~] be drawn to standard engineering scale. Any necessary details or sections must [~~shall~~] be included. As a minimum, the plan must [~~shall~~] show property boundaries, fencing, internal roadways, tipping area, processing area, post-processing area, facility office, sanitary facilities, potable water facilities, storage areas, etc. If phasing is proposed for the facility, a separate facility plan for each phase is required.

(E) Process description. The process description shall be composed of a descriptive narrative along with a process diagram. The process description shall include all of the following.

(i) (No change.)

(ii) Tipping process. Indicate what happens to the feedstock material from the point it enters the gate. Indicate how the material is handled in the tipping area, how long it remains in the tipping area, what equipment is used, how the material is evacuated from the tipping area, at what interval the tipping area is cleaned, and the process used to clean the tipping area.

(iii) (No change.)

(iv) Post-processing. Provide a complete narrative on the post-processing, include post-processing times, identification and segregation of product, storage of product, quality assurance, and quality control.

(v) - (vi) (No change.)

(7) Site operating plan. This document is to provide guidance from the design engineer to site management and operating personnel in sufficient detail to enable them to conduct day-to-day [~~day to day~~] operations in a manner consistent with the engineer's [~~engineers~~] design. As a minimum, the site operating plan shall include specific guidance or instructions on the all of the following:

(A) - (B) (No change.)

(C) security, site access control, traffic control, and safety;

(D) control of dumping within designated areas, and screening for unprocessable or unauthorized material;

(E) - (G) (No change.)

(H) quality assurance and quality control. As a minimum, the applicant shall provide testing and assurance in accordance with the provisions of §332.71 of this title (relating to Sampling and Analysis Requirements for Final Product);

(I) - (L) (No change.)

(8) (No change.)

(9) Financial assurance. The applicant shall prepare a closure plan acceptable to the executive director and provide evidence of financial assurance to the commission for the cost of closure. The closure plan at a minimum, shall include evacuation of all material on-site (feedstock, in process, and processed) to an authorized facility and disinfection of all leachate handling facilities, tipping area, processing area, and post-processing area and shall be based on the worst case closure scenario for the facility, including the assumption that all storage and processing areas are filled to capacity. The financial assurance may be demonstrated by using one or more of the following mechanisms: trust funds, surety bonds, letters of credit, insurance, financial test, and corporate guarantee. These mechanisms shall be prepared on forms approved by the executive director and shall be submitted to the commission 60 days prior to the receiving of any materials for processing. Financial assurance mechanisms prepared are subject to the requirements of Chapter 37 of this title (relating to Financial Assurance).

(10) (No change.)

(11) Landowner list. The applicant shall include a list of landowners, residents, and businesses within one-half [~~one half~~] mile of the facility boundaries along with an appropriately scaled map locating property owned by the landowners.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

The Texas Commission on Environmental Quality (commission) proposes amendments to §§336.1, 336.2, 336.11, 336.103, 336.111, 336.113, 336.203, 336.207, 336.209, 336.211, 336.305, 336.363, 336.501, 336.701, 336.702, 336.705, 336.707 - 336.709, 336.711, 336.716, 336.718, 336.720, 336.723, 336.728 - 336.730, 336.733, 336.735 - 336.737, and 336.743. The commission also proposes new §§336.9, 336.703, 336.704, 336.717, 336.738, 336.801, 336.803, 336.805, 336.807 - 336.809, 336.811, 336.813, 336.815, 336.817, 336.819, 336.821, 336.823, 336.825, 336.901, 336.903, 336.905, 336.907, and 336.909 and the repeal of §336.703.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement House Bill (HB) 1567, 78th Legislature, 2003, and its amendments to Texas Health and Safety Code, Chapter 401 (also known as the Texas Radiation Control Act). The bill provides for the licensing of a low-level radioactive waste (LLRW) disposal facility and establishes procedures for the commission to accept and evaluate license applications from private entities to dispose of LLRW. After a review for comparative merit, the commission may refer one application, after technical review and public comment, to the State

Office of Administrative Hearings (SOAH) for a contested case hearing, if requested by applicant or an affected person, or if the commission determines a hearing would be in the public interest. The commission intends to address additional provisions of HB 1567, such as the compact waste disposal fees, in a future rulemaking.

HB 1567 repeals Texas Health and Safety Code, Chapter 402 (the Texas Low-Level Radioactive Waste Disposal Authority Act) in its entirety. This repeal eliminates most of the duties and responsibilities that were transferred from the Texas Low-Level Radioactive Waste Disposal Authority to the Texas Natural Resource Conservation Commission, the predecessor to the Texas Commission on Environmental Quality, effective September 1, 1999. HB 1567 retained authority with the commission for specific support and liaison responsibilities related to LLRW that were part of the duties of the abolished Texas Low-Level Radioactive Waste Disposal Authority. HB 1567 also repealed Texas Health and Safety Code, §401.203 (License Restricted to Public Entity), which provided that an LLRW disposal license be issued only to a public entity specifically authorized for LLRW disposal.

Under federal law, Texas is responsible for managing the LLRW generated within its borders. Texas entered into an agreement designated as the Texas Low-Level Radioactive Waste Disposal Compact with the states of Maine and Vermont where Texas will provide for an LLRW disposal facility. The Texas Low-Level Radioactive Disposal Waste Compact was ratified by the United States Congress and signed by President Clinton in September 1998. The State of Maine passed emergency legislation to withdraw from the Texas Low-Level Radioactive Disposal Waste Compact in April 2002. The withdrawal of Maine is scheduled to take effect in April 2004.

Texas is an "Agreement State" for the regulation of LLRW disposal under the Atomic Energy Act of 1954, as amended. Section 274 of the Atomic Energy Act provides a statutory basis under which the United States Nuclear Regulatory Commission (NRC) relinquishes to Texas portions of its regulatory authority to license and regulate specific radioactive material. The transfer agreement of this federal authority to the state is signed by the Governor and the Chair of the NRC. As part of this agreement, the commission must remain compatible in its rules and policies related to LLRW disposal and is subject to periodic review by the NRC for compatibility.

The commission exercises certain authority ceded to the state by the NRC under the *Articles of Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission and Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*. The commission's proposed rules address matters relating to this regulatory authority. The primary purpose of the proposed rulemaking is to revise the commission's application processing and licensing requirements for the disposal of LLRW at the compact waste disposal facility or federal facility waste disposal facility and implement the provisions of two federal NRC rulemakings relating to skin dose and deliberate misconduct. The commission recognizes that issues concerning radioactive materials are very complex and may involve various state and federal agencies. The proposed rulemaking is not intended to address matters that are not within the jurisdiction of the commission, such as matters under the jurisdiction of the Texas Department of Health or the Texas Low-Level Radioactive Waste Disposal Compact Commission, authority retained by the NRC, or matters preempted by federal law.

HB 1567 provides that the commission may license federal facility waste disposal at a separate and distinct facility that is operated exclusively for the disposal of federal facility waste and that is adjacent to the compact waste disposal facility. Before accepting federal facility waste, the license holder must submit to the commission a written statement, signed by an official of the federal government, stating that the federal government will assume all required right, title, and interest in land and buildings acquired for the disposal of federal facility waste in accordance with the Federal Nuclear Policy Act of 1982, Subtitle D (42 United States Code (USC), §§10171 *et seq*.), as amended. For the first five years after issuance of a license, the overall capacity of the federal facility waste disposal facility is limited to not more than three million cubic yards. The capacity may then be increased to a total volume of six million cubic yards unless the commission makes an affirmative finding that increasing the capacity of the federal facility waste disposal facility would pose a significant risk to human health, public safety, or the environment. A major amendment to the LLRW facility license would be required to increase the volume capacity for federal facility waste, even in the absence of an affirmative finding by the commission. New definitions for "Compact," "Compact waste," "Compact waste disposal facility," "Federal facility waste," "Federal facility waste disposal facility," "Host state," "Mixed waste," "Party state," and "Perpetual care account" are proposed for §336.2 to implement the new statutory requirements. New Chapter 336, Subchapter I and Subchapter J are also proposed to implement the statute.

HB 1567 specifically authorizes that mixed waste may be disposed of at the LLRW disposal facility. "Mixed waste" is a combination of hazardous waste as defined by Texas Health and Safety Code, Chapter 361 (also known as the Solid Waste Disposal Act) and LLRW. "Mixed waste" also includes federal mixed waste as proposed in §336.2. The compact waste disposal facility license holder, in accepting mixed waste at the compact waste disposal facility or a federal facility waste disposal facility, must comply with Chapter 361; Texas Health and Safety Code, Chapter 401; and the Resource Conservation and Recovery Act of 1976 (42 USC, §§6901 *et seq*.), as amended. Specific license conditions related to mixed waste will be incorporated into an LLRW disposal license issued by the commission.

Discussion of Texas Health and Safety Code, §401.216, Acquisition of property.

Ownership of property in fee, that is, both the surface rights and the mineral rights, must be demonstrated for an administratively complete application. This ownership is directly related to the ability to transfer property to the state or federal government prior to accepting waste that must also be demonstrated for an administratively complete application. Land ownership requirements are provided in federal rules and in existing state rules, as a matter of NRC compatibility. HB 1567 allows for possible deviations from existing land ownership requirements that necessitate an applicant requesting possible exemptions under §336.5. The commission has the ability to grant exemptions under §336.5 if it determines that the exemption is not prohibited by law and will not will result in a significant risk to public health and safety or the environment. Persons requesting an exemption must demonstrate that the proposed alternative approach is as protective to the public and the environment as the existing requirements from

which an exemption is being requested. Such requests for exemptions from specific requirements by an applicant must be included in an administratively complete application for LLRW disposal.

HB 1567 specifies an application selection process for a compact waste disposal facility license. Not later than January 1, 2004, the commission shall publish notice in the *Texas Register* that applications for the siting, construction, and operation of a facility or facilities for disposal of LLRW will be accepted by the commission for a 30-day period, beginning 180 days after the date of the notice. All applications received will be evaluated by the commission for administrative completeness, and applications deemed administratively complete will be evaluated in accordance with statutory criteria for the purposes of comparing the relative merit of the applications. Based on the written evaluations and the application materials, the commission shall select the application that has the highest comparative merit. The statutory criteria are specified in the form of weighted tiers. These tiers and the application selection process are specified in proposed new Subchapter I.

This rulemaking also implements HB 1678. This bill changes the name of the "radiation and perpetual care fund" to "perpetual care account," and provides that the account is an account in the general revenue fund. Conforming changes to rules are given in Subchapter H, §336.720 (Post- Closure Observation and Maintenance) and §337.737 (Funding for Institutional Control); and 30 TAC Chapter 37, Subchapter T (Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste); §37.9045 (Financial Assurance for Closure, Post Closure, Corrective Action, and Liability Coverage); and §37.9050 (Financial Assurance Mechanisms).

Some additional changes outside the scope of the bill implementation are being proposed as part of this rulemaking. This rulemaking implements federal requirements which are necessary to maintain compatibility between federal and state rules.

The amendments of §336.2 and §336.305 are derived from NRC final rulemaking "Revision of the Skin Dose Limit" (66 FR 16298, April 5, 2002), effective June 4, 2002. The commission must incorporate NRC rulemakings into its rules to preserve the status of the State of Texas as an "Agreement State" authorized to administer a portion of the radiation control program in the state.

The NRC amended its regulations to change the definition and method of calculating "shallow- dose equivalents" by specifying that the assigned shallow-dose equivalents must be the dose averaged over ten square centimeters of skin receiving the highest exposure, rather than one square centimeter as stated in the existing regulation.

This rulemaking makes the skin dose limit less restrictive when small areas of skin are irradiated and to address skin and extremity doses from all source geometries under a single limit. This change requires measuring or calculating shallow-dose equivalents from discrete radioactive particles on or off the skin, from very small areas (1.0 square centimeter) of skin contamination, and from any other source of shallow-dose equivalent, by averaging the measured or calculated dose over the most highly exposed, contiguous ten square centimeters for comparison to the skin dose limit of 50 rem.

The commission concurs with the NRC that previous requirements for skin dose including frequent monitoring of workers to detect small area exposures might permit more frequent, "transient," observable effects such as reddening of the skin. However, the change to a larger averaging area will result in no more than insignificant health implications and in other aspects will reduce hazards and increase protection. When the standard measurement area was one centimeter, workers were required to wear multiple layers of protective clothing that resulted in workers being subjected to non- radiological hazards, such as heat stress. In addition, workers' mobility and dexterity were hampered by the redundant use of protective equipment and clothing which required them to spend more time completing a job in radiation areas. Therefore, the previous redundant use of protective clothing and other equipment to avoid small area skin contamination may in fact expose workers to more significant hazards than are being avoided.

Proposed new §336.9 is derived from NRC final rulemaking "Deliberate Misconduct by Unlicensed Persons" (63 FR 1890, January 13, 1998), effective February 12, 1998. The commission must incorporate NRC rulemakings into its rules to preserve the status of the State of Texas as an "Agreement State" authorized to administer a portion of the radiation control program in the state.

The NRC enacted this rule to be able to take enforcement action against an unlicensed person, such as an employee, contractor, or consultant, or take other administrative action directly against a person, such as issuance of a notice of violation, who deliberately causes a licensee to be in violation of a requirement, provides material inaccurate information to a licensee, or provides material inaccurate information to a regulator. Similarly, by adopting this rule, any person who knowingly violates a state rule or requirement would be subject to enforcement action under Texas Water Code, Chapter 7, and Texas Health and Safety Code, §401.393.

Various sections are proposed to be amended to change the name of this commission from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality" to implement HB 2912, 77th Legislature, 2001, §18.01. Typographical error corrections and other amendments to improve readability are proposed.

SECTION BY SECTION DISCUSSION

SUBCHAPTER A: GENERAL PROVISIONS

Section 336.1, Scope and General Provisions

Section 336.1(e) is proposed to be amended to change "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality," implementing HB 2912, §18.01. Subsection (f)(2) is proposed to be amended to delete the requirement that only a public entity may receive LLRW from other persons for the purpose of disposal, reflecting the repeal of Texas Health and Safety Code, §401.203 in HB 1567. Specifically, the word "person" is substituted for "public entity."

Section 336.2, Definitions

Section 336.2 is proposed to be amended to make it compatible with the latest version of Title 10 Code of Federal Regulations (CFR) §20.1003. The definition of "Shallow-dose equivalent (H_s)" is specifically proposed to be amended to add after "skin," the words "of the whole body" and after "or," the words "the skin of" to clarify that the definition applies to the skin of the whole body or to the skin of an extremity. The definition is also proposed to be amended to delete "averaged over an area of one square centimeter" to agree with the amendment proposed

to §336.305(c) for averaging over ten square centimeters of skin. Additional definitions for "Compact," "Compact waste," "Compact waste disposal facility," "Federal facility waste," "Federal facility waste disposal facility," "Host state," "Mixed waste," "Party state," and "Perpetual care account" are proposed for §336.2 to implement the new statutory requirements of HB 1567. The definitions are renumbered accordingly. The definition of "Hazardous waste" is proposed to be added to provide a reference to 30 TAC Chapter 335 (Industrial Solid Waste and Municipal Hazardous Waste). The definition of "Radiation and perpetual care fund" is proposed to be amended by changing the term to "Radiation and perpetual care account." This amendment is proposed to provide consistency with HB 1567 and HB 1678. The definition of "Licensee" is proposed to be amended to delete an unnecessary acronym and provide a correct citation to Texas Health and Safety Code, Chapter 401. The definition of "Violation" is proposed to be amended to spell out the acronym TRCA as "Texas Radiation Control Act."

Section 336.9, Deliberate Misconduct

New §336.9 is proposed to implement federal requirements given in 10 CFR §61.9b. The proposed section would subject certain persons specified in rule to enforcement action for deliberate misconduct. Deliberate misconduct may involve providing information that is known to be incomplete or inaccurate in some respect material to the commission, or it may involve conduct that causes or would have caused, if not detected, a licensee or applicant to be in violation of any of the commission's requirements.

Section 336.11, Memorandum of Understanding Between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions

The proposed amendments to §336.11 reflect the commission's name change. The title of the section is amended to delete "Texas Natural Resource Conservation Commission." At the end of the section, the name of the commission is changed to the new name to correct the address from which to request a copy of the memorandum of understanding. These amendments implement the commission name change in HB 2912, §18.01.

SUBCHAPTER B: RADIOACTIVE SUBSTANCE FEES

Section 336.103, Schedule of Fees for Subchapter H Licenses

The proposed amendment to §336.103(a) would implement HB 1567, §401.229, and would change the license application processing fee from $415,000 to $500,000, and would make the fee nonrefundable. The proposed amendment would also provide that if the commission's costs in processing an application under Subchapter H exceed the $500,000 application processing fee, the commission may assess and collect additional fees from the applicant to recover the costs. The proposed amendments to §336.103(c) would implement HB 1567, §401.206, and would provide for the expenses of more than one resident inspector.

Section 336.111, Method of Payment of Fees

The proposed amendment to §336.111 would change "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality" to implement HB 2912, §18.01.

Section 336.113, Failure to Pay Prescribed Annual Fees

The proposed amendments to §336.113 would provide a reference to 30 TAC Chapter 12 (Payment of Fees) to identify the manner in which penalties and interest are assessed for the late payment of fees.

SUBCHAPTER C: GENERAL DISPOSAL REQUIREMENTS

Section 336.203, License Required

The proposed amendment to §336.203 would change "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality" to implement HB 2912, §18.01, and delete the acronym "TDH" because it is not used again within the section.

Section 336.207, General Requirements for Issuance of a License

The proposed amendment would add the phrase "of this chapter (relating to Radioactive Substance Rules)" to denote that the "applicable chapter" refers to Chapter 336.

Section 336.209, Issuance of License

The proposed amendments would change the phrase "agency rules" to "commission rules" and would correct the spelling of the term "radioactive."

Section 336.211, General Requirements for Radioactive Material

The proposed amendment to §336.211(f) would replace the term "public entity" with the term "person" because HB 1567 repealed Texas Health and Safety Code, §401.203.

SUBCHAPTER D: STANDARDS FOR PROTECTION AGAINST RADIATION

Section 336.305, Occupational Dose Limits for Adults

The proposed amendments to §336.305 make it compatible with the latest version of NRC's 10 CFR §20.1201. Section 336.305(a)(2) is proposed to be amended to add after "skin" the words "of the whole body" and before "extremities" the words "the skin of" to clarify that the annual limits apply to the skin of the whole body and to the skin of the extremities. Section 336.305(c) is also proposed to be amended to add that the deep-dose equivalent "must be for the part of the body receiving the highest exposure" and that the shallow-dose equivalent must be "averaged over the contiguous ten square centimeters of skin receiving the highest exposure."

Section 336.363, Appendix F, Requirements for Receipt of Low-Level Radioactive Waste for Disposal at Licensed Land Disposal Facilities and Uniform Manifests

The proposed amendments delete references to older NRC rule changes in subsections (a)(1)(A); (2)(B), (D), and (E); (3); and (b)(1). The referenced March 27, 1995 NRC rule change had two acceptable versions. In a subsequent November 20, 1998 rule change, the version already incorporated in this rule section was made the final, official version. Unless otherwise specified, an "Agreement State," such as Texas, has three years after the promulgation of an NRC rule change to adopt it in state rules. An NRC rule change is not effective in the "Agreement State" until it is adopted and effective in state rules. When a state adopts NRC rule changes by reference, as in this section, the NRC encourages the state to use its own effective date. The proposed amendments will cite to the appropriate NRC rules, as amended.

SUBCHAPTER F: LICENSING OF ALTERNATIVE METHODS OF DISPOSAL OF RADIOACTIVE MATERIAL

Section 336.501, Scope and General Provisions

The proposed amendment to §336.501(b) would replace the term "public entity" with the term "person" because HB 1567 repealed Texas Health and Safety Code, §401.203.

SUBCHAPTER H: LICENSING REQUIREMENTS FOR NEAR-SURFACE LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

Section 336.701, Scope and General Provisions

Section 336.701(a) is proposed to be amended by deleting the words "for near-surface land disposal of low-level radioactive waste and accelerator-produced radioactive material." This is done to improve sentence construction and clarity, and to eliminate redundant language. Subsection (b)(1) is proposed to be amended to correct a cross-reference.

Section 336.702, Definitions

The proposed amendments to §336.702 would add a definition for "Containerized Class A waste" and would renumber the paragraphs accordingly. This definition is proposed to implement HB 1567, Texas Health and Safety Code, §401.218(c), which provides that the commission by rule may require a compact waste disposal facility license holder to dispose of certain Class A LLRWs that present a hazard because of their high radiation levels in the manner required for Class B and Class C LLRW. The statutory term "high radiation level" has no equivalent definition in current federal or state rules. The proposed definition is consistent with the existing term "high radiation area," where "high radiation levels" are radiation levels from an unshielded container that could result in an individual receiving a dose equivalent in excess of 0.1 rem in one hour at 30 centimeters from any surface of the container that the radiation penetrates. The definition of "Hazardous waste," is proposed to be deleted because it is redundant with the definition of "Hazardous wastes" given in §336.2.

Section 336.703, License Required - Repeal

Existing §336.703 is proposed to be repealed because it is redundant of the requirement in §336.701(a) that states: "No person shall engage in disposal of low-level radioactive waste received from other persons except as authorized in a specific license issued under this subchapter."

Section 336.703, Concepts

New §336.703 is proposed to incorporate the concepts and requirements of 10 CFR §61.7 (Concepts). These are NRC program elements that have particular health and safety significance. The essential objectives of these program elements are necessary to maintain an adequate program. In addition, this proposed new rule provides many of the concepts that make the rest of the subchapter understandable.

Section 336.704, Applications for License of Compact Waste Disposal Facility

New §336.704 is proposed to provide requirements for applications for licenses to dispose of LLRW at the "Compact" waste disposal facility. New subsection (a) is proposed to provide that only one license to dispose of LLRW from other persons may be issued by the commission, which implements HB 1567, §401.202(b). New subsection (b) is proposed to provide that the compact waste disposal facility licensed under this subchapter is the regional disposal facility established and operated under the compact established under Texas Health and Safety Code, Chapter 403 for purposes of the federal Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC, §2021b-2021j). New subsection (b) implements HB 1567, §401.214.

Section 336.705, Content of Application

Section 336.705 is Section 336.705 is proposed to be amended to include the words "low-level radioactive" in the first sentence and to improve grammar.

Section 336.707, Specific Technical Information

The proposed amendments to §336.707(6) require that an application for disposal of LLRW include a description of any prior disposal containing radioactive material at the site. An accurate accounting of all radionuclides is essential so that the performance objective for the site can be demonstrated.

Section 336.708, Environmental Information

Section 336.708 is proposed to be amended by designating existing rule language as subsection (a). Paragraph (11) is proposed to be amended to add language to specify that the closure plan is also to cover site stabilization, which would be compatible with 10 CFR §61.7(c)(2), and to specify that the intent is to eliminate the need for active maintenance "after closure," and to require an estimated date of site closure for planning purposes. New subsection (b) is proposed for compatibility with 10 CFR §61.10. This NRC rule states: "An environmental report prepared in accordance with subpart A of part 51 of this chapter must accompany this application." Proposed new subsection (b) incorporates the environmental report requirements.

Section 336.709, Technical and Environmental Analyses

Section 336.709 is a list of demonstrations which an applicant must make as part of the technical and environmental portion of the application. Cross-references to existing performance standards are proposed to be added to ensure that the correct demonstrations are submitted to the agency. Implied subsection (a) is proposed to be amended by adding a cross-reference to the performance objectives in §336.723. Paragraph (1) is proposed to be amended by adding language that specifically requires that the potential effects on the general population be evaluated for a minimum period of 1,000 years after closure or the period where peak dose occurs, whichever is longer. Paragraph (2) is proposed to be amended by adding a cross-reference to the performance objective for inadvertent intrusion in §336.725. Paragraph (3) is proposed to be amended by adding a cross-reference to the performance objective for protection of individuals during operations in §336.726. Paragraph (4) is proposed to be amended by adding a cross-reference to the performance objective for stability of the disposal site after closure in §336.727.

Section 336.711, Financial Information

The proposed amendments to §336.711 would add cross references to other rule sections that provide more detailed information on financial qualification and financial assurance requirements.

Section 336.716, Terms and Conditions of License

The proposed amendment to §336.716(c) is intended to provide a citation to Texas Health and Safety Code, Chapter 401. The proposed amendment to §336.716(h) would require an initial license term of 15 years rather than a fixed licensing period of 20 years in accordance with new Texas Health and Safety Code, §401.222. A new sentence is also proposed to be added stating: "After the initial 15 years, the commission may renew the

license for one or more terms of ten years." This sentence is proposed to be added to implement new Texas Health and Safety Code, §401.222. Proposed new subsection (i) provides that the compact waste disposal facility license must require the license holder to indemnify the state for any liability imposed on the state under state or federal law for the disposal of federal facility waste. This provision implements HB 1567, §401.211(c).

Section 336.717, Conveyance of Waste

A new §336.717 is proposed to specify criteria by which title to compact waste is conveyed to the state which implements HB 1567, §401.2051. Proposed subsection (a) provides that title to the waste is conveyed to the state at the time the waste is accepted at the disposal site. Proposed subsection (b) provides that title and all related rights and interest in the compact waste are the property of the commission on the state's behalf.

Section 336.718, Application for Renewal or Closure

The proposed amendments to §336.718(a) would change the time requirement on applying for a license renewal from 30 days before license expiration to one year before license expiration.

Section 336.720, Post-closure Observation and Maintenance

The amendment to §336.720 would add new subsection (b) which states "Upon transfer of the license to the custodial agency, the licensee will be released from the requirements of liability coverage under Chapter 37, Subchapter T of this title (relating to Financial Assurance for Near-Surface Land Disposal of Radioactive Waste)."

Section 336.723, General Requirement

The title for the §336.723 is proposed to be changed to "Performance objective" because this is a more descriptive term for the sections which are referred to in this section.

Section 336.728, Disposal Site Suitability Requirements for Near-Surface Land Disposal

Section 336.728(k) is proposed to be amended to add a requirement that "If activities involving radioactive material were previously performed on the site, the applicant shall evaluate the contribution of those activities that may impact the ability of the site to meet performance objectives." New §336.728(m) - (p) are proposed to further delineate areas unsuitable for the disposal site, which implement HB 1567, §401.217.

Section 336.729, Disposal Site Design for Near-Surface Land Disposal

New §336.729(g) is proposed to implement HB 1567, §401.220, with respect to hazards from local meteorological or geologic conditions.

Section 336.730, Near-Surface Land Disposal Facility Operation and Disposal Site Closure

The proposed amendments to §336.730(a) would improve formatting and update a section title. The proposed amendments to §336.730(b) would reorganize the subsection to provide specific requirements for disposal of containerized Class A LLRW, as defined at §336.702(5), as well as Class B and Class C LLRWs. These types of wastes must be disposed of within a reinforced concrete container and within a reinforced concrete barrier. These types of wastes must also be disposed of in such a manner that the waste can be monitored and retrieved. These new requirements implement HB 1567, §401.218.

Section 336.733, Waste Classification, Characteristics, and Labeling

The proposed amendments to §336.733(a) would require that all LLRW and mixed waste received for disposal must be classified in accordance with the NRC waste classification system. This would include any federal facility waste received for disposal. Proposed new §336.733(c) would require that a licensee comply with the requirements of Chapter 335 for the disposal of mixed waste, and would implement HB 1567, §401.221.

Section 336.735, Applicant Qualifications and Assurances

The proposed amendment to §336.735 would require that applicants provide proof of funds sufficient to cover any annual license fee and any agency costs of processing the application that may exceed the $500,000 application processing fee.

Section 336.736, Funding for Disposal Site Closure and Stabilization

The proposed amendments to §336.736 would change the title to Liability Coverage and Funding for Disposal Site Closure and Stabilization. Subsection (c) is proposed to be amended by adding the words "and cost estimates" to specify that cost estimates will also be reviewed annually because it is the cost estimate that provides the basis for any required adjustment in financial assurance. A new subsection (e) is proposed to be added to require that before commencement of operations, the applicant shall provide financial assurance for bodily injury and property damage to third parties caused by sudden and non-sudden accidental occurrences arising from operations of the compact waste disposal facility and/or federal facility waste disposal facility in a manner that meets the requirements of Chapter 37. The new section title and new subsection implement HB 1567, §401.233 and §401.112.

Section 336.737, Funding for Institutional Control

The proposed amendments to §336.737(a) would change the term "Radiation and Perpetual Care Fund" to "perpetual care account" to implement HB 1567, §401.052(d). Language is also proposed to be added to subsection (a) to provide the method of calculation of an amount of funding for "perpetual" institutional control by the state. The language is derived from NRC's *Draft Regulatory Guide DG-4006, Demonstrating Compliance with the Radiological Criteria for License Termination*, dated August 1998. Section 4.2.3 of the guide (Amount of Financial Assurance) states: "For funds placed into an account segregated from the licensee's assets and outside its administrative control, the financial assurance fund may be assumed to earn a real (i.e., inflation adjusted, after tax) rate of return of 2% per year . . .. Therefore, if perpetual control and maintenance were planned, the financial assurance funding would be 50 times the first year annual cost . . .." Subsection (b) is proposed to be amended by substituting "Prior to the commencement of operations" for "During the term of the license before the institutional control period" to require that financial assurance for the institutional control period must be in place in the same manner as required for disposal site closure and stabilization, liability coverage, and corrective action. Active operation of the facility could end at any time during the term of the license, and decommissioning could be required, triggering the need for funding from financial assurance. Cessation of operations would impact the ability of the license holder to fund financial assurance; therefore, the statutory requirements of Texas Health and Safety Code, §401.109 and §401.241, requiring that financial security to fund closure, corrective action, and institutional control is available at the time

of decommissioning are met by ensuring that financial assurance is in place prior to the commencement of facility operations.

Section 336.738, Funding for Corrective Action

This proposed new section requires that the amount of security required of a license holder under this section shall not be less than $20 million at the time the disposal facility site is decommissioned. The proposed amendment conforms with new statutory requirements given in Texas Health and Safety Code, §401.241(b). Proposed new subsection (a) requires that financial assurance for corrective action be in place prior to the commencement of operations for the same reasons as outlined in the preamble discussion of §336.737. Corrective action is proposed to be defined in §37.9035 (Definitions), as the activities to remediate unplanned events that pose a risk to public health and safety and that may occur after the decommissioning and closure of the compact waste disposal facility or a federal facility waste disposal facility. Proposed new subsection (b) states that the payment schedule will be determined by the executive director. The payment schedule will be a condition of the LLRW disposal license. Proposed new subsection (c) provides the cross-reference to Chapter 37, Subchapter T.

Section 336.743, Resident Inspector

The proposed amendments to §336.743 would change the title to "Resident Inspectors" and provide for two or more resident inspectors, which implements HB 1567, §401.206.

NEW SUBCHAPTER I: COMPACT WASTE DISPOSAL FACILITY APPLICATION SELECTION PROCESS

Section 336.801, Applicability

New §336.801 is proposed to provide a statement of general applicability for Subchapter I, which implements HB 1567. This subchapter describes the procedures for submitting and evaluating license applications to receive, possess, and dispose of LLRW from others at the compact waste disposal facility.

Section 336.803, Receipt of License Applications

New §336.803 is proposed to specify the procedures the agency must follow to publish notice to receive applications for the siting, construction, and operation of a facility or facilities for disposal of LLRW. The proposed rule implements HB 1567, §401.228 and §401.230. The statute requires that the commission shall publish notice in the *Texas Register* not later than January 1, 2004.

Section 336.805, Application Requirements

New §336.805 is proposed to provide general requirements for submittal of applications. Subsection (a)(2) implements HB 1567, §401.229, and provides that the application must include a non-refundable $500,000 application processing fee. Subsection (a)(3) implements HB 1567, §401.219, which requires an applicant to provide evidence relating to the reasonableness of any technique for managing LLRW to be practiced at the proposed disposal facility or facilities.

Section 336.807, Administrative Review

New §336.807 is proposed to specify the procedures the agency must follow in reviewing license applications and determining if those applications are administratively complete. This section implements HB 1567, §401.230 and §401.231.

Section 336.808, Ownership of Land and Buildings

New §336.808 is proposed to require that an application to receive, possess, and dispose of LLRW from others at the compact waste disposal facility may not be considered administratively complete unless the applicant has acquired the title to and any interest in land and buildings on which the facility or facilities are to be located. The requirement for ownership of the land and buildings in "fee simple" is specified in federal and state rules; 10 CFR §61.14 for example, requires ownership in fee by the federal or state government. Similar provisions in existing rules are located at §336.710(2) and §336.734(a). Proposed subsection (b) provides that if an applicant is unsuccessful in acquiring undivided ownership of the mineral estate in fee simple of the land on which the facility or facilities are proposed to be located, the applicant may, to the extent permissible under federal law, request an exemption of the requirement under §336.5. If the requirement of ownership of the mineral estate in fee simple title is exempted under this subsection, the applicant may enter into a surface use agreement that restricts mineral access, including slant drilling and subsurface mining, to the extent necessary to prevent intrusion into the disposal facility site. This provides compatibility with 10 CFR §61.5(a)(4), which provides that the site may not include areas of known mineral resources which if exploited would result in failure of the performance objectives. Proposed subsection (c) provides that if an applicant cannot reach a surface use agreement and cannot otherwise obtain fee simple title to the mineral estate of the land on which the facility or facilities are proposed to be located, the applicant may petition the commission under 30 TAC §1.8 (Initiation of Proceeding) to request the Texas Attorney General to institute condemnation proceedings as provided under Texas Property Code, Chapter 21, to acquire fee simple interest in the mineral rights. These proposed provisions implement HB 1567, §401.204.

Section 336.809, Notice of Declaration of Administrative Completeness

New §336.809 is proposed to provide notice of an administratively complete application in accordance with 30 TAC §39.702 (Notice of Declaration of Administrative Completeness).

Section 336.811, Public Meeting

New §336.811 is proposed to require at least one public meeting in the county or counties where a compact wasted disposal facility or federal facility waste disposal facility is proposed to be located. The purpose of the public meeting is to receive public comments on the administratively complete applications as provided in 30 TAC §55.253 (Public Comment Processing), and implements HB 1567, §401.232(b).

Section 336.813, Evaluation of Applications

New §336.813 is proposed to specify the procedures the agency must follow in reviewing administratively complete license applications and evaluating each application according to the statutory criteria established by Texas Health and Safety Code, §§401.233 - 401.236. The purpose of the evaluation is to compare the relative merit of the applications. This proposed section implements HB 1567, §401.232.

Section 336.815, Tier 1 Criteria

New §336.815 is proposed to specify the Tier 1 criteria for evaluation of administratively complete applications, which are listed in HB 1567, §401.233. HB 1567, §401.232 provides that the commission may also adopt criteria in addition to the statutory criteria specified in proposed §336.815, provided that the criteria are consistent with this section.

Section 336.817, Tier 2 Criteria

New §336.817 is proposed to specify the Tier 2 criteria for evaluation of administratively complete applications, which are listed in HB 1567, §401.234. HB 1567, §401.232 provides that the commission may also adopt criteria in addition to the statutory criteria specified in proposed §336.817, provided that the criteria are consistent with this section.

Section 336.819, Tier 3 Criteria

New §336.819 is proposed to specify the Tier 3 criteria for evaluation of administratively complete applications, which are listed in HB 1567, §401.235. HB 1567, §401.232 provides that the commission may also adopt criteria in addition to the statutory criteria specified in proposed §336.819, provided that the criteria are consistent with this section.

Section 336.821, Tier 4 Criteria

New §336.821 is proposed to specify the Tier 4 criteria for evaluation of administratively complete applications, which are listed in HB 1567, §401.236. HB 1567, §401.232 provides that the commission may also adopt criteria in addition to the statutory criteria specified in proposed §336.821, provided that the criteria are consistent with this section.

Section 336.823, Technical Review

New §336.823 is proposed to specify the procedures the agency must follow in reviewing the selected license application of highest comparative merit, and determining if that application is technically complete. This proposed new section implements HB 1567, §401.237. The statute requires that the technical review shall be completed and a draft license prepared not later than the 15th month after the month in which the technical review begins. The executive director shall give priority to the review of the selected application over all other radioactive materials licensing and registration matters pending before the commission.

Section 336.825, Delegation

New §336.825 is proposed to provide that the commission delegates to the executive director the authority to review and evaluate applications for radioactive materials licenses under this subchapter and to select the one application under §336.813 for further technical review. A decision by the executive director under §336.813 is not appealable to the commission until the commission makes a final decision on the selected license application.

NEW SUBCHAPTER J: FEDERAL FACILITY WASTE DISPOSAL FACILITY

Section 336.901, Applicability

New §336.901 is proposed to provide a statement of general applicability for Subchapter J. This proposed subchapter provides additional licensing requirements to the requirements of Subchapter H and other rules of this title for the disposal of federal facility waste at a separate disposal unit at the compact waste disposal facility. This subchapter implements HB 1567, §401.216.

Section 336.903, Receipt of Waste

New §336.903 is proposed to provide requirements for the receipt of federal facility waste. Proposed subsection (a) requires that the compact waste disposal facility license holder may not accept federal facility waste for disposal unless the compact waste disposal facility license holder is licensed for its disposal under Texas Health and Safety Code, §401.207. Subsection (b) is proposed to require that a licensee may not accept federal facility waste at a federal facility waste disposal facility until the licensee begins accepting compact waste at the compact waste disposal facility. This provision implements HB 1567, §401.216(e).

Section 336.905, Volume Limitation

New §336.905 is proposed to provide statutorily imposed limits on the total volume of federal facility waste which may be disposed of at a federal facility waste disposal facility. Proposed subsection (a) provides that for the first five years after a license is issued under this subchapter, the license shall limit the overall capacity of the federal facility waste disposal facility to not more than three million cubic yards. Of that amount, the total volume of LLRW accepted at the federal facility waste disposal facility that must be disposed of in reinforced concrete containers and within a reinforced concrete barrier, shall be limited to not more than 300,000 cubic yards. Proposed subsection (b) provides that after five years from the date of licensing of the disposal of federal facility waste under this subchapter, the capacity of the federal facility waste disposal facility may be increased by three million cubic yards for a total capacity of six million cubic yards. An application for license amendment under §305.62 will be required to increase the total capacity. Also, there must be a determination by the commission that increasing the capacity of the federal facility waste disposal facility would not pose a significant risk to human health, public safety, or the environment. These proposed provisions implement HB 1567, §401.216(b) and (c).

Section 336.907, Prohibition of Commingling of Waste

New §336.907 is proposed to prohibit the commingling of compact waste and federal facility waste. If licensed to dispose of federal facility waste, the licensee shall maintain separate waste transport, waste acceptance, waste processing, and waste disposal of compact waste and federal facility waste. This proposed provision implements HB 1567, §401.216(d).

Section 336.909, Additional Responsibilities

New §336.909 is proposed to implement additional statutory requirements. Proposed §336.909(1), which implements HB 1567, §401.205(b)(1), requires the licensee to arrange for and pay the costs of management, control, stabilization, and disposal of federal facility waste and the decommissioning of the licensed federal facility waste disposal activity. Proposed §336.909(2), which implements HB 1567, §401.205(B)(4), requires the licensee to submit to the commission a written agreement by an official of the federal government, stating that the federal government will assume all title and interest in land and buildings acquired for the disposal of federal facility waste, together with requisite rights of access to the land and buildings. Proposed §336.909(3), which implements HB 1567, §401.205(b)(3), requires the licensee to formally acknowledge conveyance of the right, title, and interest in LLRW to the federal government prior to termination of the license. Proposed §336.909(4), which implements HB 1567, §401.210, requires the licensee to transfer LLRW and mixed waste and land and buildings to the federal government without cost to the government, other than the government's administrative and legal costs incurred in making the transfer. Proposed §336.909(5), which implements HB 1567 §401.211(a) - (c), requires the licensee to indemnify the state, and its officers and agents, by license condition for any liability imposed on the state under state or federal law, for damages, removal or remedial action with respect to the land, the facility, or the waste accepted, stored or disposed of, because the transfer does not relieve a license holder of liability for any act or omission before or following the transfer. An existing commission requirement in §336.734 provides that disposal of LLRW received from other persons may

be permitted only on land owned in fee by the state or federal government. Ordinarily, the transfer of ownership from a license applicant to the state or federal government occurs at license issuance. However, commission rules in §336.5 provide for an exemption process. This exemption process is available to applicants seeking to transfer ownership of a federal facility waste disposal facility at decommissioning.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rules are in effect, there will be fiscal implications for the commission and other units of state and local government as a result of administration or enforcement of the proposed rules.

The rule amendments are proposed as part of a larger proposal in order to implement HB 1567, which provides requirements for the licensing of an LLRW disposal site in Texas and establishes procedures for the commission to accept and evaluate license applications from private entities to dispose of LLRW. A disposal facility may accept "Compact" waste (LLRW generated in Texas, Maine, or Vermont or LLRW that has been approved for importation to this state by the Compact Commission) and may also accept federal facility waste at a separate but adjacent facility. In addition, a disposal facility may accept mixed waste, that is, waste containing both low-level radioactive waste and hazardous waste constituents.

The proposed rules implement legislative requirements in HB 1567, including the repeal of the restriction that an LLRW disposal facility license may only be issued to a public entity. The proposed rules implement procedural requirements for license application submission, review, and selection. The proposed rules also implement federal requirements to maintain compatibility with NRC requirements, and update existing rules by changing references from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

The commission anticipates fiscal implications as a result of the enforcement or administration of the proposed rules. The 78th Legislature appropriated the commission funding (estimated to be $954,018 in Fiscal Year 2004 and $1,049,018 in Fiscal Year 2005 from fees and balances in the Low- Level Radioactive Waste Account), and personnel (five additional full-time equivalent positions in 2004 and 1.5 additional full-time equivalent positions in 2005) to implement HB 1567 and to provide for the licensing of an LLRW disposal facility.

HB 1567 requires a license application fee of $500,000 and would provide the commission the authority to collect any other fees necessary to license and regulate the site. Even though the bill eliminates Texas Health and Safety Code, Chapter 402, the Low-Level Radioactive Waste Fund (Account 088) is reestablished in Texas Health and Safety Code, Chapter 401, and commission funding would come out of Account 088. The bill directs that any funding received from the two "Compact" states ($25 million) be collected by November 1, 2003. The State of Maine passed legislation to withdraw from the Texas Low-Level Radioactive Disposal Waste Compact in April 2002. It will take two years for Maine's withdrawal to take effect.

Under the Texas Low-Level Radioactive Waste Disposal Compact, §4.05(5), the host county is entitled to 10% of any payment made to Texas by the party states. Therefore, the host county, wherever that is determined to be, is entitled to $2.5 million of those payments made to Texas.

The host county of an LLRW disposal facility licensed under the proposed revisions to Chapter 401, Subchapter F would be entitled to 5% (previously 10%) of the gross revenues of all waste receipts to the facility. The bill changed the 10% requirement so that the other 5% of compact waste fee revenue would be deposited to the General Revenue Fund. This fiscal note does not include the fiscal impact of waste disposal fees to any entity, as the commission intends to address the compact waste disposal fees in a future rulemaking.

After a review for comparative merit, the commission may refer one application, after technical review and public comment, to SOAH for a contested case hearing, if requested by the applicant, an affected person, or the commission. The contested case hearing, if required, is anticipated to take place in Fiscal Year 2007 and, SOAH's costs alone are estimated to be $250,000 and a previous contested case hearing on a license application of similar complexity had estimated commission costs of approximately of $775,000 in 1998. These costs will be borne by the applicant.

Rulemaking, policy, and operational changes will be required to implement the proposed rules, including changes to policy and procedures regarding posting of financial security mechanisms. The commission assumes that the following time line would take place and the commission would receive two license applications for a total of $1 million in license application fees.

Figure: 30 TAC Chapter 336--Preamble

HB 1567 specifies an application selection process for a compact waste disposal facility license. Not later than January 1, 2004, the commission shall publish notice in the *Texas Register* that applications for the siting, construction, and operation of a facility or facilities for disposal of LLRW will be accepted by the commission for a 30-day period, beginning 180 days after the date of the notice. All applications received will be evaluated by the commission for administrative completeness, and applications deemed administratively complete will be evaluated in accordance with statutory criteria for the purposes of comparing the relative merit of the applications. Based on the written evaluations and the application materials, the commission shall select the application that has the highest comparative merit. The statutory criteria are specified in the form of weighted tiers. These tiers and the application selection process are specified in Texas Health and Safety Code, §§401.233 - 401.236.

New Staff

There will be five new full-time equivalent positions required for the proposed licensing function in the Waste Permitting Division of the Office of Permitting, Remediation, and Registration. One senior civil/structural/operations engineer will be required to review, analyze, and testify on design and operations planning. One senior environmental engineer will be required to review, analyze, and testify on engineering design and operations pertaining to impacts on the environment. One senior hydrologist will be required to review, analyze, and testify on meteorological and surface water aspects of the application. One program specialist (quality assurance/quality control) will be required to perform a variety of major communication activities including first to edit, assimilate, and disseminate the technical reviews into an environmental assessment which provides thorough analysis of the application. One administrative technician will be required to

plan and implement all administrative support for the management of the program.

The licensing process of the proposed facility is anticipated to cover five years (Fiscal Years 2004 - 2008). The Environmental Law Division would provide legal support in rulemaking, license application processing, draft licensing, and discussion with federal agencies and state advisory boards. The legal staff would represent the executive director in any contested case hearings on contested license applications. Beginning in Fiscal Year 2005, an additional 1.5 full-time equivalent positions in the Office of Legal Services will be required to implement HB 1567.

Professional Services

Professional services costs include the significant role of contractors in meeting the deadline of the proposal effectively and efficiently. Contractor estimates are based on general contract engineering costs which include a 3.5 multiplier for contractor fringe and indirect costs. These could be lowered if interagency contracts were primarily utilized. Contractors may be hired to expedite the licensing process and provide for an independent review of applications. Contracts may also include the services of a socio-economist, an archeologist, and an ecologist on a part-time, but continual basis to develop plans, evaluate, and testify on their areas of expertise. During the first year their services may be limited while guidance and application preparation is ongoing; however, during the second and third year, they may be needed for review and verification activities during site evaluation and license processing. During the fourth and fifth year, their activities may again be limited during final license preparation and hearings, as needed. Professional services costs are estimated as follows: $200,000 in Fiscal Year 2004; $700,000 each year in Fiscal Years 2005 and 2006; $400,000 in Fiscal Year 2007; and $300,000 in Fiscal Year 2008.

Travel

In-state and out-of-state travel will include site reconnaissance and training. The in-state travel includes time for site reconnaissance visits during the first three years while licensing is in progress, and time for hearings during the fourth and fifth years. Some split-sampling is anticipated for verification purposes during the licensing period. The out-of-state travel reflects one trip for NRC training per year for each of the five new full-time equivalent positions. Costs for in-state and out-of- state travel are estimated to be between $12,000 and $22,000 for the five-year period.

Training

Training will include NRC licensing-related courses and technical courses such as groundwater modeling, performance assessment, and structural engineering. The estimated $8,000 per year cost reflects one course per year per each of the five new full-time equivalent positions.

Other Operating Costs

Sampling equipment will be needed by license specialists taking samples to obtain baseline sample data. Lab costs and purchase of field safety equipment (estimated to be between $6,500 and $7,500 each year for Fiscal Years 2004 - 2006) and will also be necessary for the site evaluation.

As previously stated, all of the costs to the commission for licensing of the proposed site will be paid from fees, unexpended balances, and any other revenue collected and deposited into the Low- Level Radioactive Waste Fund. If only one application is received and no funding is received from the "Compact" states and appropriated to the commission to recover costs in reviewing license applications, an applicant may expect additional fees to be charged for any activity related to the licensing or administration of the proposed rules to reimburse the commission for its costs. Commission costs are estimated to be $594,837 in Fiscal Year 2004; $1,178,953 in Fiscal Year 2005; $1,210,138 in Fiscal Year 2006; $1,932,588 in Fiscal Year 2007, which includes SOAH costs; and $807,588 in Fiscal Year 2008.

The proposed rules also implement changes from HB 1567 and HB 1678, relating to the Radiation and Perpetual Care Fund. HB 1678 changes the name to the Radiation and Perpetual Care Account and re-establishes the account in the general revenue fund. Money and security in the Perpetual Care Account may be used only for the decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, and disposal of radioactive material for the protection of the public health and safety and the environment. The 78th Legislature appropriated the commission any revenues and proceeds in the Perpetual Care Account for the purposes previously stated. Money and/or security for financial assurance for site closure, post closure, and corrective action activities would be deposited into and funded from the account according to rules adopted by the commission. Funds expended from the Perpetual Care Account to respond to shipping accidents involving LLRW must be reimbursed to the Perpetual Care Account by the responsible shipper or transporter according to rules adopted by the Texas Department of Health.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be compliance with state law and established procedures for the commission to accept and evaluate license applications from private entities to dispose of LLRW to ensure protection of public health and safety and the environment.

Fiscal implications are anticipated to businesses or individuals who wish to apply for a license to dispose of and manage LLRW in Texas.

Applicants for an LLRW disposal license will be limited to specific geographic areas of the state as defined by statute. The proposed rules would change the license application processing fee from $415,000 to $500,000 and would make the fee nonrefundable. The proposed rules would also provide that if the commission costs to process an application under Subchapter H, exceed the $500,000 application processing fee, the commission may assess and collect additional fees from the applicant to recover the costs. If only one application is received and no funding is received from the "Compact" states and appropriated to the commission for recovery of costs in processing the license application, an applicant may expect additional fees to be charged for any activity related to the licensing or administration of the proposed rules to reimburse the commission for its costs. Commission costs are estimated to be $594,837 in Fiscal Year 2004; $1,178,953 in Fiscal Year 2005; $1,210,138 in Fiscal Year 2006; $1,932,588 in Fiscal Year 2007, which includes SOAH costs if a contested case hearing is required; and $807,588 in Fiscal Year 2008. The applicant will also be responsible for any contested case hearing costs. SOAH's costs alone are estimated to be $250,000; commission costs for a previous contested case hearing on an LLRW disposal license application in Fiscal Year 1998 were estimated at $775,000.

The proposed rules would provide specific requirements for the disposal of any LLRW which must be disposed of within a reinforced concrete container and within a reinforced concrete barrier. These types of wastes must also be disposed of in such a manner that the waste can be monitored and retrieved. In addition, the proposed rules require that an application to receive, possess, and dispose of LLRW may not be considered administratively complete unless the applicant has acquired the title to and any interest in land and buildings on which the facility or facilities are to be located.

The proposed rules require that the "Compact" waste disposal facility license holder may not accept federal facility waste for disposal unless the "Compact" waste disposal facility license holder is licensed for its disposal under Texas Health and Safety Code, §401.207. A licensee may not accept federal facility waste until the licensee begins accepting "Compact" waste. Also, for the first five years after a license is issued under this chapter, the license shall limit the overall capacity of the federal facility waste disposal facility to not more than 3,000,000 cubic yards. The capacity may then be increased to a total volume of 6,000,000 cubic yards unless the commission makes an affirmative finding that increasing the capacity of the federal facility waste disposal facility would pose a significant risk to human health, public safety, or the environment. A major amendment to the LLRW facility license would be required to increase the volume capacity for federal facility waste, even in the absence of an affirmative finding by the commission. The proposed rules prohibit the commingling of compact waste and federal facility waste.

The proposed rules require the licensee to arrange for and pay the costs of management, control, stabilization, and disposal of federal facility waste and the decommissioning of the licensed federal facility waste disposal activity. The licensee would be required to submit to the commission a written agreement by an official of the federal government stating that the federal government will assume all title and interest in land and buildings acquired for the disposal of federal facility waste, together with requisite rights of access to the land and buildings.

The legislation requires that a minimum of $20 million in security be provided at the time the facility is decommissioned. Because it is not known when the facility would be decommissioned, the minimum required amount of security would be available for corrective action when the license is issued. A payment schedule for corrective action financial assurance will be established in the LLRW disposal license for any amounts required above the minimum requirement. The total amount of security established in the payment schedule would be based upon the amount of LLRW received at the site, long-term risks, and the need to address and prevent unplanned events. The payment schedule must be sufficient to ensure that the amount of security provided by the license holder at any time between the issuance of the license and the time at which the facility is decommissioned is sufficient to address any increase in the risk to public health and safety that accompanies an increase in the volume of waste and to meet the requirements of the commission to address unplanned events.

Prior to facility operation, financial assurance for the institutional control period and disposal site closure and stabilization must also be in place. A license holder would be allowed to use insurance to meet these requirements. Financial assurance costs for closure and post-closure activities will depend upon cost estimates to perform those activities. The costs estimates for closure and post-closure activities will not be known until the license application has been evaluated.

The proposed rules would require financial assurance requirements for liability coverage adequate to cover potential injury to any property or person. The same amount of coverage is proposed as is currently required for hazardous and nonhazardous industrial solid waste facilities. Annual premium costs are estimated to be between $40,000 and $70,000 for this type of coverage.

Any costs incurred by the license applicant to meet proposed or current licensing, operations, maintenance, and financial assurance requirements are expected to be recovered through fees collected by the licensee assessed for the disposal of LLRW. Fees will be assessed to waste generators in Texas and the other "Compact" party states, and may include electric utilities, hospitals, and others. Operations, maintenance, and financial assurance costs for the federal facility will be borne by the licensee and recovered through charges to the federal government for waste disposal. Fee amounts will depend upon many variables, including the amount and type of waste disposed of at the proposed facility. This fiscal note does not include the fiscal impact of waste disposal fees to any entity, as the commission intends to address the "Compact" waste disposal fees in a future rulemaking.

Commercial LLRW generators in Texas, Maine, and Vermont, as well as federal facility waste generators throughout the United States, could potentially use an LLRW disposal facility in Texas. Currently, LLRW must be stored on-site at the generator's facility or shipped out-of-state at considerable expense. The fiscal implications to LLRW generators cannot be quantified at this time. An LLRW disposal facility would not be available for use by LLRW generators until some time after calendar year 2008. Waste disposal fees will be determined in a subsequent rulemaking closer to this time when the LLRW disposal facility is scheduled to open.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed rules because there are no known small or micro-businesses that own or operate, or are likely to own or operate, an LLRW disposal site with a $500,000 application fee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required, because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 336 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because there are no significant requirements added to radioactive material disposal facilities. The

proposed rulemaking action implements legislative requirements in HB 1567, including the repeal of the restriction that an LLRW disposal facility may only be issued to a public entity specifically authorized by law for LLRW disposal. The proposed rulemaking implements procedural requirements for license application submission, review, and selection. The proposed rules also implement federal requirements to maintain consistency with NRC requirements, and updates existing rules by changing references from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. In addition, the State of Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules do not exceed the standards set by federal law. The proposed rulemaking implements changes in federal requirements for skin dose limits and deliberate misconduct.

The proposed rules do not exceed an express requirement of state law. The Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive materials. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in HB 1567.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules do not exceed the NRC requirements nor exceed the requirements for retaining status as an "Agreement State."

These rules are proposed under specific authority of the Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government code, Chapter 2007 does not apply to these proposed rules because the implementation of the NRC rulemakings on skin dose limits and deliberate misconduct is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The State of Texas has received authorization as an "Agreement State" from the NRC to administer a radiation control program under the Atomic Energy Act. The Atomic Energy Act requires the NRC to find that the state's program is compatible with NRC requirements for the regulation of radioactive materials and is adequate to protect of health and safety. The proposed rulemaking will provide compatibility with federal regulations relating to skin dose limits and deliberate misconduct.

Nevertheless, the commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to implement changes to Texas Radiation Control Act required by HB 1567, 78th Legislature, 2003 for the regulation and licensing of the disposal of LLRW, implement federal requirements relating to skin dose limits and deliberate misconduct, and make non-substantive amendments to commission rules, such as amendments to reflect the commission's name change. The proposed rules would substantially advance this purpose by amending existing rules to conform with new statutory requirements, by implementing new federal requirements for skin dose limits and deliberate misconduct, and by reflecting the new name of the agency.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules primarily implement changes to existing rules to reflect statutory requirements in HB 1567. In addition, the proposed rules reduce burdens on licensing by allowing private entities to submit applications for licensing of an LLRW disposal facility.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this proposed rulemaking action and determined that the proposed rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin, Texas, on September 16, 2003, at 1:30 p.m., at the commission's central office, 12100 Park 35 Circle, Building E, Room 201. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and to answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, and who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037- 336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Policy and Regulations Division at (512) 239-1510.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§336.1, 336.2, 336.9, 336.11

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments and new section are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments and new section implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.1. Scope and General Provisions.

(a) - (d) (No change.)

(e) No person may cause or allow the release of radioactive material, which is subject to the rules in this chapter, to the environment in violation of this chapter or of any rule, license, or order of the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality (commission).

(f) No person shall:

(1) (No change.)

(2) receive low-level radioactive waste from other persons for the purpose of disposal, except for a person [~~public entity~~] specifically licensed for the disposal of low-level radioactive waste; or

(3) (No change.)

(g) (No change.)

§336.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, or as described in Chapter 3 of this title (relating to Definitions), unless the context clearly indicates otherwise. Additional definitions used only in a certain subchapter will be found in that subchapter.

(1) - (21) (No change.)

(22) Compact - The Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006 and Texas Low-Level Radioactive Waste Disposal Compact Consent Act, Public Law Number 105 - 236 (1998).

(23) Compact waste - Low-level radioactive waste that:

(A) is generated in a host state or a party state; or

(B) is not generated in a host state or a party state, but has been approved for importation to this state by the compact commission under §3.05 of the compact established under Texas Health and Safety Code, §403.006.

(24) Compact waste disposal facility - The low-level radioactive waste disposal facility licensed by the commission under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) for the disposal of compact waste.

(25) [~~(22)~~] Constraint (dose constraint) - A value above which specified licensee actions are required.

(26) [~~(23)~~] Critical group - The group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.

(27) [~~(24)~~] Curie (Ci) - See §336.4 of this title.

(28) [~~(25)~~] Declared pregnant woman - A woman who has voluntarily informed the licensee, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman withdraws the declaration in writing or is no longer pregnant.

(29) [~~(26)~~] Decommission - To remove (as a facility) safely from service and reduce residual radioactivity to a level that permits:

(A) release of the property for unrestricted use and termination of license; or

(B) release of the property under restricted conditions and termination of the license.

(30) [~~(27)~~] Deep-dose equivalent (H_d) (which applies to external whole-body exposure) - The dose equivalent at a tissue depth of one centimeter (1,000 milligrams/square centimeter).

(31) [~~(28)~~] Demand respirator - An atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

(32) [~~(29)~~] Depleted uranium - The source material uranium in which the isotope uranium-235 is less than 0.711%, by weight, of the total uranium present. Depleted uranium does not include special nuclear material.

(33) [~~(30)~~] Derived air concentration (DAC) - The concentration of a given radionuclide in air which, if breathed by the "reference man" for a working year of 2,000 hours under conditions of light work (inhalation rate of 1.2 cubic meters of air/hour), results in an intake of one ALI. DAC values are given in Table I, Column 3, of §336.359, Appendix B, of this title.

(34) [~~(31)~~] Derived air concentration-hour (DAC-hour) - The product of the concentration of radioactive material in air (expressed as a fraction or multiple of the derived air concentration for each radionuclide) and the time of exposure to that radionuclide, in hours. A licensee shall take 2,000 DAC-hours to represent one ALI, equivalent to a committed effective dose equivalent of five rems (0.05 sievert).

(35) [~~(32)~~] Disposal - With regard to low-level radioactive waste, the isolation or removal of low-level radioactive waste from mankind and mankind's environment without intent to retrieve that low-level radioactive waste later.

(36) [~~(33)~~] Disposable respirator - A respirator for which maintenance is not intended and that is designed to be discarded after excessive breathing resistance, sorbent exhaustion, physical damage, or end-of-service-life renders it unsuitable for use. Examples of this type of respirator are a disposable half-mask respirator or a disposable escape-only self-contained breathing apparatus (SCBA).

(37) [~~(34)~~] Distinguishable from background - The detectable concentration of a radionuclide is statistically different from the background concentration of that radionuclide in the vicinity of the site or, in the case of structures, in similar materials using adequate measurement technology, survey, and statistical techniques.

(38) [~~(35)~~] Dose - A generic term that means absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, committed effective dose equivalent, total organ dose equivalent, or total effective dose equivalent. For purposes of the rules in this chapter, "radiation dose" is an equivalent term.

(39) [~~(36)~~] Dose equivalent (H_T) - The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of dose equivalent are the rem and sievert (Sv).

(40) [~~(37)~~] Dose limits - The permissible upper bounds of radiation doses established in accordance with the rules in this chapter. For purposes of the rules in this chapter, "limits" is an equivalent term.

(41) [~~(38)~~] Dosimetry processor - An individual or organization that processes and evaluates individual monitoring devices in order to determine the radiation dose delivered to the monitoring devices.

(42) [~~(39)~~] Effective dose equivalent (H_E) - The sum of the products of the dose equivalent to each organ or tissue (H_T) and the weighting factor (w_T) applicable to each of the body organs or tissues that are irradiated.

(43) [~~(40)~~] Embryo/fetus - The developing human organism from conception until the time of birth.

(44) [~~(41)~~] Entrance or access point - Any opening through which an individual or extremity of an individual could gain access to radiation areas or to licensed radioactive materials. This includes portals of sufficient size to permit human access, irrespective of their intended use.

(45) [~~(42)~~] Exposure - Being exposed to ionizing radiation or to radioactive material.

(46) [~~(43)~~] Exposure rate - The exposure per unit of time.

(47) [~~(44)~~] External dose - That portion of the dose equivalent received from any source of radiation outside the body.

(48) [~~(45)~~] Extremity - Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

(49) Federal facility waste - Low-level radioactive waste that is the responsibility of the federal government under the Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 United States Code, §2021b - 2021j).

(50) Federal facility waste disposal facility - A facility for the disposal of federal facility waste licensed under Subchapter H of this chapter.

(51) [~~(46)~~] Filtering facepiece (dust mask) - A negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium, not equipped with elastomeric sealing surfaces and adjustable straps.

(52) [~~(47)~~] Fit factor - A quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

(53) [~~(48)~~] Fit test - The use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

(54) [~~(49)~~] General license - An authorization granted by an agency under its rules which is effective without the filing of an application with that agency or the issuance of a licensing document to the particular person.

(55) [~~(50)~~] Generally applicable environmental radiation standards - Standards issued by the EPA under the authority of the Atomic Energy Act of 1954, as amended through October 4, 1996, that impose limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

(56) [~~(51)~~] Gray (Gy) - See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(57) Hazardous waste - Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(58) [~~(52)~~] Helmet - A rigid respiratory inlet covering that also provides head protection against impact and penetration.

(59) [~~(53)~~] High radiation area - An area, accessible to individuals, in which radiation levels from radiation sources external to the body could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 millisievert) in one hour at 30 centimeters from the radiation source or 30 centimeters from any surface that the radiation penetrates.

(60) [~~(54)~~] Hood - A respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

(61) Host state - A party state in which a compact facility is located or is being developed. The State of Texas is the host state under the Texas Low-Level Radioactive Waste Disposal Compact, §2.01, established under Texas Health and Safety Code, §403.006 (Text of Compact).

(62) [~~(55)~~] Individual - Any human being.

(63) [~~(56)~~] Individual monitoring - The assessment of:

(A) dose equivalent by the use of individual monitoring devices; or

(B) committed effective dose equivalent by bioassay or by determination of the time-weighted air concentrations to which an individual has been exposed, that is, DAC-hours; or

(C) dose equivalent by the use of survey data.

(64) [~~(57)~~] Individual monitoring devices - Devices designed to be worn by a single individual for the assessment of dose equivalent such as film badges, thermoluminescence dosimeters (TLDs), pocket ionization chambers, and personal ("lapel") air sampling devices.

(65) [~~(58)~~] Inhalation class - See "Class."

(66) [~~(59)~~] Inspection - An official examination and/or observation including, but not limited to, records, tests, surveys, and monitoring to determine compliance with the Texas Radiation Control Act (TRCA) and rules, orders, and license conditions of the commission.

(67) [~~(60)~~] Internal dose - That portion of the dose equivalent received from radioactive material taken into the body.

(68) [~~(61)~~] Land disposal facility - The land, buildings and structures, and equipment which are intended to be used for the disposal of low-level radioactive wastes into the subsurface of the land. For purposes of this chapter, a "geologic repository" as defined in 10 CFR §60.2 as amended through October 27, 1988 (53 FR [~~FedReg~~] 43421) (relating to Definitions - high-level radioactive wastes in geologic repositories) is not considered a "land disposal facility."

(69) [~~(62)~~] Lens dose equivalent (LDE) - The external exposure of the lens of the eye and is taken as the dose equivalent at a tissue depth of 0.3 centimeter (300 mg/cm^2).

(70) [~~(63)~~] License - See "Specific license."

(71) [~~(64)~~] Licensed material - Radioactive material received, possessed, used, processed, transferred, or disposed of under a license issued by the commission.

(72) [~~(65)~~] Licensee - Any person who holds a license issued by the commission in accordance with the Texas Health and Safety Code, Chapter 401 (Radioactive Materials and Other Sources of Radiation) [~~TRCA~~] and the rules in this chapter. For purposes of the rules in this chapter, "radioactive material licensee" is an equivalent term. Unless stated otherwise, "licensee" as used in the rules of this chapter means the holder of a "specific license."

(73) [~~(66)~~] Licensing state - Any state with rules equivalent to the Suggested State Regulations for Control of Radiation relating to, and having an effective program for, the regulatory control of naturally occurring or accelerator-produced radioactive material (NARM) and which has been designated as such by the Conference of Radiation Control Program Directors, Inc.

(74) [~~(67)~~] Loose-fitting facepiece - A respiratory inlet covering that is designed to form a partial seal with the face.

(75) [~~(68)~~] Lost or missing licensed radioactive material - Licensed material whose location is unknown. This definition includes material that has been shipped but has not reached its planned destination and whose location cannot be readily traced in the transportation system.

(76) [~~(69)~~] Low-level radioactive waste -

(A) Except as provided by subparagraph (B) of this paragraph, low-level radioactive waste means radioactive material that:

(i) is discarded or unwanted and is not exempt by a Texas Department of Health rule adopted under the Texas Health and Safety Code, §401.106;

(ii) is waste, as that term is defined by 10 CFR §61.2; and

(iii) is subject to:

(I) concentration limits established under this chapter; and

(II) disposal criteria established under this chapter.

(B) Low-level radioactive waste does not include:

(i) high-level radioactive waste defined by 10 CFR §60.2;

(ii) spent nuclear fuel as defined by 10 CFR §72.3;

(iii) transuranic waste as defined in [~~by paragraph (128) of~~] this section;

(iv) byproduct material as defined by paragraph (16)(B) of this section;

(v) naturally occurring radioactive material (NORM) waste; or

(vi) oil and gas NORM waste.

(C) When used in this section, the references to 10 CFR sections mean those CFR sections as they existed on September 1, 1999, as required by Texas Health and Safety Code, §401.005.

(77) [~~(70)~~] Lung class - See "Class."

(78) [~~(71)~~] Member of the public - Any individual except when that individual is receiving an occupational dose.

(79) [~~(72)~~] Minor - An individual less than 18 years of age.

(80) Mixed waste - A combination of hazardous waste, as defined by Texas Health and Safety Code, Chapter 361, and low-level radioactive waste. The term includes compact waste and federal facility waste containing hazardous waste.

(81) [~~(73)~~] Monitoring - The measurement of radiation levels, radioactive material concentrations, surface area activities, or quantities of radioactive material and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of the rules in this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(82) [~~(74)~~] Naturally occurring or accelerator-produced radioactive material (NARM) - Any naturally occurring or accelerator-produced radioactive material except source material or special nuclear material.

(83) [~~(75)~~] Naturally occurring radioactive material (NORM) waste - Solid, liquid, or gaseous material or combination of materials, excluding source material, special nuclear material, and byproduct material, that:

(A) in its natural physical state spontaneously emits radiation;

(B) is discarded or unwanted; and

(C) is not exempt under rules of the Texas Department of Health adopted under Texas Health and Safety Code, §401.106.

(84) [~~(76)~~] Near-surface disposal facility - A land disposal facility in which low-level radioactive waste is disposed of in or within the upper 30 meters of the earth's surface.

(85) [~~(77)~~] Negative pressure respirator (tight fitting) - A respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator.

(86) [~~(78)~~] Nonstochastic effect - A health effect, the severity of which varies with the dose and for which a threshold is believed to exist. Radiation-induced cataract formation is an example of a nonstochastic effect. For purposes of the rules in this chapter, "deterministic effect" is an equivalent term.

(87) [~~(79)~~] Occupational dose - The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to radiation and/or to radioactive material from licensed and unlicensed sources of radiation, whether in the possession of the licensee or other person. Occupational dose does not include dose received from background radiation, as a patient from medical practices, from voluntary participation in medical research programs, or as a member of the public.

(88) [~~(80)~~] Oil and gas naturally occurring radioactive material (NORM) waste - Naturally occurring radioactive material (NORM) waste that constitutes, is contained in, or has contaminated oil and gas waste as that term is defined in the Texas Natural Resources Code, §91.1011.

(89) [~~(81)~~] On-site - The same or geographically contiguous property that may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way that the property owner controls and to which the public does not have access, is also considered on-site property.

(90) Party state - Any state that has become a party to the compact in accordance with Article VII of the Texas Low-Level Radioactive Waste Disposal Compact, established under Texas Health and Safety Code, §403.006.

(91) Perpetual care account - The radiation and perpetual care account as defined in this section.

(92) [~~(82)~~] Personnel monitoring equipment - See "Individual monitoring devices."

(93) [~~(83)~~] Planned special exposure - An infrequent exposure to radiation, separate from and in addition to the annual occupational dose limits.

(94) [~~(84)~~] Positive pressure respirator - A respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

(95) [~~(85)~~] Powered air-purifying respirator (PAPR) - An air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

(96) [~~(86)~~] Pressure demand respirator - A positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.

(97) [~~(87)~~] Principal activities - Activities authorized by the license which are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(98) [~~(88)~~] Public dose - The dose received by a member of the public from exposure to radiation and/or radioactive material released by a licensee, or to any other source of radiation under the control of the licensee. It does not include occupational dose or doses received from background radiation, as a patient from medical practices, or from voluntary participation in medical research programs.

(99) [~~(89)~~] Qualitative fit test (QLFT) - A pass/fail test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

(100) [~~(90)~~] Quality factor (Q) - The modifying factor listed in Table I or II of §336.3 of this title that is used to derive dose equivalent from absorbed dose.

(101) [~~(91)~~] Quantitative fit test (QNFT) - An assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

(102) [~~(92)~~] Quarter (Calendar quarter) - A period of time equal to one-fourth of the year observed by the licensee (approximately 13 consecutive weeks), providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(103) [~~(93)~~] Rad - See §336.3 of this title.

(104) [~~(94)~~] Radiation - Alpha particles, beta particles, gamma rays, x-rays, neutrons, high-speed electrons, high-speed protons, and other particles capable of producing ions. For purposes of the rules in this chapter, "ionizing radiation" is an equivalent term. Radiation, as used in this chapter, does not include non-ionizing radiation, such as radio- or microwaves or visible, infrared, or ultraviolet light.

(105) [~~(95)~~] Radiation and Perpetual Care Account [~~Fund~~] - An account in the general revenue fund established [~~A fund established in the treasury of the State of Texas~~] for the purposes specified [~~set forth~~] in the Texas Health and Safety Code, §401.305. [~~TRCA, §401.305.~~]

(106) [~~(96)~~] Radiation area - Any area, accessible to individuals, in which radiation levels could result in an individual receiving a dose equivalent in excess of 0.005 rem (0.05 millisievert) in one hour at 30 centimeters from the source of radiation or from any surface that the radiation penetrates.

(107) [~~(97)~~] Radiation machine - Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(108) [~~(98)~~] Radioactive material - A naturally-occurring or artificially-produced solid, liquid, or gas that emits radiation spontaneously.

(109) [~~(99)~~] Radioactive substance - Includes byproduct material, radioactive material, low-level radioactive waste, source material, special nuclear material, source of radiation, and NORM waste, excluding oil and gas NORM waste.

(110) [~~(100)~~] Radioactivity - The disintegration of unstable atomic nuclei with the emission of radiation.

(111) [~~(101)~~] Radiobioassay - See "Bioassay."

(112) [~~(102)~~] Reference man - A hypothetical aggregation of human physical and physiological characteristics determined by international consensus. These characteristics shall be used by researchers and public health workers to standardize results of experiments and to relate biological insult to a common base. A description of "reference man" is contained in the International Commission on Radiological Protection report, ICRP Publication 23, "Report of the Task Group on Reference Man."

(113) [~~(103)~~] Rem - See §336.3 of this title.

(114) [~~(104)~~] Residual radioactivity - Radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of routine or accidental releases of radioactive material at the site and previous burials at the site, even if those burials were made in accordance with the provisions of 10 CFR Part 20.

(115) [~~(105)~~] Respiratory protection equipment - An apparatus, such as a respirator, used to reduce an individual's intake of airborne radioactive materials. For purposes of the rules in this chapter, "respiratory protective device" is an equivalent term.

(116) [~~(106)~~] Restricted area - An area, access to which is limited by the licensee for the purpose of protecting individuals against undue risks from exposure to radiation and radioactive materials. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building shall be set apart as a restricted area.

(117) [~~(107)~~] Roentgen (R) - See §336.3 of this title.

(118) [~~(108)~~] Sanitary sewerage - A system of public sewers for carrying off waste water and refuse, but excluding sewage treatment facilities, septic tanks, and leach fields owned or operated by the licensee.

(119) [~~(109)~~] Sealed source - Radioactive material that is permanently bonded or fixed in a capsule or matrix designed to prevent release and dispersal of the radioactive material under the most severe conditions that are likely to be encountered in normal use and handling.

(120) [~~(110)~~] Self-contained breathing apparatus (SCBA) - An atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

(121) [~~(111)~~] Shallow-dose equivalent (H_s) (which applies to the external exposure of the skin of the whole body or the skin of an extremity) - The dose equivalent at a tissue depth of 0.007 centimeter (seven milligrams/square centimeter) [~~averaged over an area of one square centimeter~~].

(122) [~~(112)~~] SI - The abbreviation for the International System of Units.

(123) [~~(113)~~] Sievert (Sv) - See §336.3 of this title.

(124) [~~(114)~~] Site boundary - That line beyond which the land or property is not owned, leased, or otherwise controlled by the licensee.

(125) [~~(115)~~] Source material -

(A) Uranium or thorium, or any combination thereof, in any physical or chemical form; or

(B) ores that contain, by weight, 0.05% or more of uranium, thorium, or any combination thereof. Source material does not include special nuclear material.

(126) [~~(116)~~] Special form radioactive material - Radioactive material which is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule and which has at least one dimension not less than five millimeters and which satisfies the test requirements of 10 CFR §71.75 as amended through September 28, 1995 (60 FR [~~FedReg~~] 50264) (Transportation of License Material).

(127) [~~(117)~~] Special nuclear material -

(A) Plutonium, uranium-233, uranium enriched in the isotope 233 or in the isotope 235, and any other material that the NRC, under the provisions of the Atomic Energy Act of 1954, §51, as amended through November 2, 1994 (Public Law 103 - 437), determines to be special nuclear material, but does not include source material; or

(B) any material artificially enriched by any of the foregoing, but does not include source material.

(128) [~~(118)~~] Special nuclear material in quantities not sufficient to form a critical mass - Uranium enriched in the isotope 235 in quantities not exceeding 350 grams of contained uranium-235; uranium-233 in quantities not exceeding 200 grams; plutonium in quantities not exceeding 200 grams; or any combination of these in accordance with the following formula: For each kind of special nuclear material, determine the ratio between the quantity of that special nuclear material and the quantity specified above for the same kind of special nuclear material. The sum of such ratios for all of the kinds of special nuclear material in combination shall not exceed one [~~1~~]. For example, the following quantities in combination would not exceed the limitation: (175 grams contained U-235/350 grams) + (50 grams U-233/200 grams) + (50 grams Pu/200 grams) = 1.

(129) [~~(119)~~] Specific license - A licensing document issued by an agency upon an application filed under its rules. For purposes of the rules in this chapter, "radioactive material license" is an equivalent term. Unless stated otherwise, "license" as used in this chapter means a "specific license."

(130) [~~(120)~~] State - The State of Texas.

(131) [~~(121)~~] Stochastic effect - A health effect that occurs randomly and for which the probability of the effect occurring, rather than its severity, is assumed to be a linear function of dose without threshold. Hereditary effects and cancer incidence are examples of stochastic effects. For purposes of the rules in this chapter, "probabilistic effect" is an equivalent term.

(132) [~~(122)~~] Supplied-air respirator (SAR) or airline respirator - An atmosphere- supplying respirator for which the source of breathing air is not designed to be carried by the user.

(133) [~~(123)~~] Survey - An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, and/or presence of radioactive materials or other sources of radiation. When appropriate, this evaluation includes, but is

not limited to, physical examination of the location of radioactive material and measurements or calculations of levels of radiation or concentrations or quantities of radioactive material present.

(134) [~~(124)~~] Termination - As applied to a license, a release by the commission of the obligations and authorizations of the licensee under the terms of the license. It does not relieve a person of duties and responsibilities imposed by law.

(135) [~~(125)~~] Tight-fitting facepiece - A respiratory inlet covering that forms a complete seal with the face.

(136) [~~(126)~~] Total effective dose equivalent (TEDE) - The sum of the deep-dose equivalent for external exposures and the committed effective dose equivalent for internal exposures.

(137) [~~(127)~~] Total organ dose equivalent (TODE) - The sum of the deep-dose equivalent and the committed dose equivalent to the organ receiving the highest dose as described in §336.346(a)(6) of this title (relating to Records of Individual Monitoring Results).

(138) [~~(128)~~] Transuranic waste - For the purposes of this chapter, wastes containing alpha emitting transuranic radionuclides with a half-life greater than five years at concentrations greater than 100 nanocuries/gram.

(139) [~~(129)~~] Type A quantity (for packaging) - A quantity of radioactive material, the aggregate radioactivity of which does not exceed A_1 for special form radioactive material or A_2 for normal form radioactive material, where A_1 and A_2 are given in or shall be determined by procedures in Appendix A to 10 CFR Part 71 as amended through September 28, 1995 (60 FR [~~FedReg~~] 50264) (Packaging and Transportation of Radioactive Material).

(140) [~~(130)~~] Type B quantity (for packaging) - A quantity of radioactive material greater than a Type A quantity.

(141) [~~(131)~~] Unrefined and unprocessed ore - Ore in its natural form before any processing, such as grinding, roasting, beneficiating, or refining.

(142) [~~(132)~~] Unrestricted area - Any area that is not a restricted area.

(143) [~~(133)~~] User seal check (fit check) - An action conducted by the respirator user to determine if the respirator is properly seated to the face. Examples include negative pressure check, positive pressure check, irritant smoke check, or isoamyl acetate check.

(144) [~~(134)~~] Very high radiation area - An area, accessible to individuals, in which radiation levels from radiation sources external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (five grays) in one hour at one meter from a source of radiation or one meter from any surface that the radiation penetrates.

(145) [~~(135)~~] Violation - An infringement of any provision of the Texas Radiation Control Act (TRCA) [~~TRCA~~] or of any rule, order, or license condition of the commission issued under the TRCA or this chapter.

(146) [~~(136)~~] Week - Seven consecutive days starting on Sunday.

(147) [~~(137)~~] Weighting factor (w_T) for an organ or tissue (T) - The proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of w_T are:
Figure: 30 TAC §336.2(147)
[~~Figure: 30 TAC §336.2(137)~~]

(148) [~~(138)~~] Whole body - For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(149) [~~(139)~~] Worker - An individual engaged in activities under a license issued by the commission and controlled by a licensee, but does not include the licensee.

(150) [~~(140)~~] Working level (WL) - Any combination of short-lived radon daughters in one liter of air that will result in the ultimate emission of 1.3×10^5 million electron volts (MeV) of potential alpha particle energy. The short-lived radon daughters are: for radon-222: polonium-218, lead-214, bismuth-214, and polonium-214; and for radon-220: polonium-216, lead- 212, bismuth-212, and polonium-212.

(151) [~~(141)~~] Working level month (WLM) - An exposure to one working level for 170 hours (2,000 working hours per year divided by 12 months per year is approximately equal to 170 hours per month).

(152) [~~(142)~~] Year - The period of time beginning in January used to determine compliance with the provisions of the rules in this chapter. The licensee shall change the starting date of the year used to determine compliance by the licensee provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

§336.9. Deliberate Misconduct.

(a) Any licensee, applicant for a license, employer of a licensee or applicant, or any contractor (including a supplier or consultant), subcontractor, employee of a contractor, or subcontractor of any licensee or applicant for a license, who knowingly provides to any licensee, applicant, contractor, or subcontractor, any components, equipment, materials, or other goods or services that relate to a licensee's or applicant's activities in this chapter, may not:

(1) engage in deliberate misconduct that causes or would have caused if not detected, a licensee or applicant to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license issued by the commission; or

(2) deliberately submit to the commission, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the commission.

(b) A person who violates subsection (a)(1) or (2) of this section may be subject to enforcement action under Texas Health and Safety Code, §401.393 and Texas Water Code, Chapter 7.

(c) For the purposes of subsection (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the commission; or

(2) constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor.

§336.11. Memorandum of Understanding With [~~Between~~] the Texas Department of Health [~~and the Texas Natural Resource Conservation Commission~~] Regarding Radiation Control Functions.

The Memorandum of Understanding between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions is adopted by reference in §7.118

of this title (relating to Memorandum of Understanding between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions). However, the full text of the memorandum of understanding can be found only in Texas Department of Health rule 25 TAC §289.101 (relating to Memorandum of Understanding between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions). If a copy of this document is required and cannot be obtained from the Internet, a copy can be requested from the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality, Chief Clerk's Office, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-3300.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. RADIOACTIVE SUBSTANCE FEES

30 TAC §§336.103, 336.111, 336.113

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.103. Schedule of Fees for Subchapter H Licenses.

(a) An application for a low-level radioactive waste disposal site license under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) shall be accompanied by a non-refundable [~~an~~] application processing fee of $500,000. If the commission's costs in processing an application under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) exceed the $500,000 application processing fee, the commission may assess and collect additional fees from the applicant to recover the costs. Recoverable costs include costs incurred by the commission for administrative review, technical review, and hearings associated with the application [~~$415,000. The application fee covers the cost of processing of the application. The applicant shall pay the application fee in two equal installments. The first payment shall be made upon submission of the application, and the balance shall be paid no more than 12 months later~~].

(b) (No change.)

(c) A holder of a license for a low-level radioactive waste disposal site issued under Subchapter H of this chapter shall submit an annual license fee for the services received. This fee shall recover for the state the actual expenses arising from the regulatory activities associated with the license. This fee shall include reimbursement for the salary and other expenses of the resident inspectors [~~a resident inspector~~] as provided by §336.743 of this title (relating to Resident Inspector). The executive director shall send an invoice for the amount of the costs incurred during the period September 1 through August 31 of each year. Payment shall be made within 30 days following the date of the invoice.

§336.111. Method of Payment of Fees.

Fee payments prescribed by this subchapter shall be made in cash or by check or money order made payable to the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality. The payments may be made by personal delivery to the Financial Administration Cashier Office, Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality, in Austin, Texas, or mailed to the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality, Cashier's Office, MC 214 [~~181~~], P.O. Box 13088, Austin, Texas 78711-3088.

§336.113. Failure to Pay Prescribed Annual Fees.

(a) A licensee failing to make payment of the fees when due under this chapter shall be assessed penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees). [~~In any case where the executive director finds that a licensee has failed to pay a fee prescribed by this subchapter by the due date, the licensee shall be assessed a penalty of 5.0% of the amount due. If the fees are not paid within 30 days after the due date, an additional 5.0% penalty shall be imposed. An annual interest rate of 12% shall be imposed on delinquent fees beginning 60 days from the due date.~~]

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. GENERAL DISPOSAL REQUIREMENTS

30 TAC §§336.203, 336.207, 336.209, 336.211

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.203. License Required.

No person shall dispose of radioactive material unless that person has a license from the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality, or an exemption from the Texas Department of Health [~~(TDH)~~] under Texas Health and Safety Code, §401.106(a).

§336.207. General Requirements for Issuance of a License.

An application may be approved if the commission determines that the requirements set forth in the applicable subchapter of this chapter and Chapter 305, Subchapter C of this title (relating to Application for Permit) have been met and that:

(1) - (4) (No change.)

§336.209. Issuance of License.

Upon a determination that an application meets the requirements of the Texas Health and Safety Code, Chapter 401 and the commission [~~agency~~] rules relating to radioactive [~~radioative~~] material licensing, the commission may issue a license authorizing the proposed activity.

§336.211. General Requirements for Radioactive Material Disposal.

(a) - (e) (No change.)

(f) The disposal of low-level radioactive waste received from other persons is prohibited, except by a person [~~public entity~~] that is specifically licensed under Subchapter H of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. STANDARDS FOR PROTECTION AGAINST RADIATION

30 TAC §336.305, §336.363

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.305. Occupational Dose Limits for Adults.

(a) The licensee shall control the occupational dose to individual adults, except for planned special exposures under §336.310 of this title (relating to Planned Special Exposures), to the following dose limits:

(1) (No change.)

(2) the annual limits to the lens of the eye, to the skin of the whole body, and to the skin of the extremities, which are:

(A) (No change.)

(B) a shallow-dose equivalent of 50 rems (0.5 sievert) to the skin of the whole body or to the skin of any extremity.

(b) (No change.)

(c) The assigned deep-dose equivalent must be for the part of the body receiving the highest exposure. The assigned and shallow-dose

equivalent must be the dose averaged over the contiguous ten square centimeters of skin for the part of the body receiving the highest exposure. The deep-dose equivalent, lens dose equivalent, and shallow-dose equivalent may be assessed from surveys or other radiation measurements for the purpose of demonstrating compliance with the occupational dose limits, if the individual monitoring device was not in the region of highest potential exposure or the results of individual monitoring are unavailable.

(d) - (f) (No change.)

§336.363. Appendix F. Requirements for Receipt of Low-Level Radioactive Waste for Disposal at Licensed Land Disposal Facilities and Uniform Manifests.

(a) Manifest requirements for shipments received at licensed land disposal facilities.

(1) Manifest forms required.

(A) The operator of a licensed low-level radioactive waste land disposal facility shall not receive for disposal any waste which does not have a completed manifest which reflects the information requested on applicable United States Nuclear Regulatory Commission (NRC) Forms 540 (Uniform Low-Level Radioactive Waste Manifest (Shipping Paper)) and 541 (Uniform Low-Level Radioactive Waste Manifest (Container and Waste Description)) and, if necessary, on an applicable NRC Form 542 (Uniform Low-Level Radioactive Waste Manifest (Manifest Index and Regional Compact Tabulation)), as those forms and requirements are prescribed in 10 Code of Federal Regulations (CFR) §61.80, as amended [~~CFR 61.80 as amended through December 27, 1982 (47 FedReg 57463)~~] (relating to Licensing Requirements for Land Disposal of Radioactive Waste) and 10 CFR §20.2006, as amended [~~20.2006 as amended through March 27, 1995 (60 FedReg 15663)~~] (relating to Standards for Protection Against Radiation). The NRC Forms 540 and 540A must be completed and must physically accompany the waste shipment received at the licensed land disposal facility. Upon agreement between the shipper and the licensed land disposal facility, NRC Forms 541 and 541A and 542 and 542A may be completed, transmitted, and stored in electronic media with the capability for producing legible, accurate, and complete records on the respective forms.

(B) (No change.)

(C) This appendix includes information requirements of the United States Department of Transportation (DOT), as codified in 49 CFR Part 172. Specific information on hazardous, medical, or other waste that is required to meet EPA [~~United States Environmental Protection Agency (EPA)~~] rules, as codified in 40 CFR Parts 259, 261, or elsewhere, is not addressed in this appendix and must be provided on the required EPA forms. However, the required EPA forms must accompany the Uniform Low-Level Radioactive Waste Manifest required by this appendix.

(2) Definitions. Terms used in this appendix have the definitions set forth as follows:

(A) (No change.)

(B) NRC Forms 540, 540A, 541, 541A, 542, and 542A - Official NRC forms referenced in this appendix, as those forms and requirements are prescribed in 10 CFR §61.80, as amended [~~61.80 as amended through December 27, 1982 (47 FedReg 57463)~~] and 10 CFR §20.2006, as amended [~~20.2006 as amended through March 27, 1995 (60 FedReg 15663)~~]. Forms received by the licensed land disposal facility need not be the originals of these forms provided that any substitute forms are equivalent to the original documentation in respect to content, clarity, size, and location of information. Upon agreement between the shipper and the licensed land disposal facility, NRC Forms 541 (and 541A) and 542 (and 542A) may be completed, transmitted, and stored in electronic media. The electronic media must have the capability for producing legible, accurate, and complete records in the format of the uniform manifest.

(C) (No change.)

(D) Shipping paper - NRC Form 540 and, if required, NRC Form 540A, as those forms and requirements are prescribed in 10 CFR §61.80, as amended [~~61.80 as amended through December 27, 1982 (47 FedReg 57463) and 10 CFR 20.2006 as amended through March 27, 1995 (60 FedReg 15663)~~], which include the information required by DOT in 49 CFR Part 172.

(E) Uniform Low-Level Radioactive Waste Manifest or uniform manifest - The combination of NRC Forms 540, 541, and, if necessary, 542, and their respective continuation sheets (Forms 540A, 541A, and 542A) as needed, or equivalent, as those forms and requirements are prescribed in 10 CFR 61.80 , as amended [~~through December 27, 1982 (47 FedReg 57463) and 10 CFR 20.2006 as amended through March 27, 1995 (60 FedReg 15663)~~].

(3) Information requirements. The uniform manifest for waste received for disposal at a licensed land disposal facility shall include all information required by instructions accompanying the forms and by 10 CFR §61.80, as amended [~~61.80 as amended through December 27, 1982 (47 FedReg 57463) and 10 CFR 20.2006 as amended through March 27, 1995 (60 FedReg 15663)~~]. This information shall include, as appropriate, general information, shipment information, disposal container and waste information, uncontainerized waste information, multi-generator disposal container information, and certifications.

(b) Control and tracking.

(1) The licensed land disposal facility operator shall acknowledge receipt of the waste within one [~~1~~] week of receipt by returning, as a minimum, a signed copy of NRC Form 540 to the shipper, as this form and requirements are prescribed in 10 CFR §61.80, as amended [~~61.80 as amended through December 27, 1982 (47 FedReg 57463)~~] and 10 CFR 20.2006 as amended through March 27, 1995 (60 FedReg 15663). The shipper to be notified is that who last possessed the waste and transferred the waste to the operator. If a discrepancy exists between materials listed on the uniform manifest and materials received, copies or electronic transfer of the affected forms must be returned indicating the discrepancy.

(2) - (3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. LICENSING OF ALTERNATIVE METHODS OF DISPOSAL OF RADIOACTIVE MATERIAL

30 TAC §336.501

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.501. Scope and General Provisions.

(a) (No change.)

(b) Except as provided by this subsection, the commission shall not authorize new or additional facilities or the expansion of existing facilities for the on-site disposal of low-level radioactive waste, except to a person [~~public entity~~] specifically authorized by law for low-level radioactive waste disposal. The commission may, on request or its own initiative, authorize, under this subchapter, on-site disposal of low-level radioactive waste on a specific basis at any facility at which low-level radioactive waste disposal operations began before September 1, 1989, if after evaluation of the specific characteristics of the waste, the disposal site, and the method of disposal, the commission finds that the continuation of the disposal activity will not constitute a significant risk to the public health and safety and to the environment.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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SUBCHAPTER H. LICENSING REQUIREMENTS FOR NEAR-SURFACE LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

30 TAC §§336.701 - 336.705, 336.707 - 336.709, 336.711, 336.716 - 336.718, 336.720, 336.723, 336.728 - 336.730, 336.733, 336.735 - 336.738, 336.743

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments and new sections are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments and new sections implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.701. Scope and General Provisions.

(a) This subchapter establishes [~~, for near-surface land disposal of low-level radioactive waste and accelerator-produced radioactive material,~~] the procedures, criteria, and terms and conditions upon which the commission issues a license for the near-surface land disposal of low-level radioactive wastes and accelerator-produced radioactive material received from other persons. The rules in this subchapter apply to disposal of low-level radioactive waste and accelerator-produced radioactive material as defined in §336.2 of this title (relating to Definitions). For the purpose of this subchapter, the term "low-level radioactive waste" includes accelerator-produced radioactive material. If there is a conflict between the rules of the commission and the rules of this subchapter, the rules of this subchapter shall prevail. No person shall engage in disposal of low-level radioactive waste received from other persons except as authorized in a specific license issued under this subchapter. A licensee under this subchapter shall conduct processing of low-level radioactive waste received for disposal at the licensed site, incidental to the disposal of that waste, in accordance with provisions of the commission license which authorizes the disposal.

(b) A licensee authorized to dispose of low-level radioactive waste under the rules in this subchapter shall not accept for disposal:

(1) high-level radioactive waste as defined in 10 Code of Federal Regulations (CFR) §60.2 [~~60.2~~] as amended through October 27, 1988 (53 FR [~~FedReg~~] 43421) (Definitions - high-level radioactive wastes in geologic repositories);

(2) - (4) (No change.)

(c) - (e) (No change.)

§336.702. Definitions.

Terms used in this subchapter are defined in §336.2 of this title (relating to Definitions). Additional terms used in this subchapter have the following definitions.

(1) - (4) (No change.)

(5) Containerized Class A waste - Class A low-level radioactive waste which presents a hazard because of high radiation levels. High radiation levels are radiation levels from an unshielded container that could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 millisievert) in one hour at 30 centimeters from any surface of the container that the radiation penetrates.

(6) [~~(5)~~] Custodial agency - A government agency designated to act on behalf of the government owner of the disposal site.

(7) [~~(6)~~] Disposal site - That portion of a land disposal facility which is used for disposal of waste. It consists of disposal units and a buffer zone.

(8) [~~(7)~~] Disposal unit - A discrete portion of the disposal site into which waste is placed for disposal. For near-surface disposal, the disposal unit is usually a trench.

(9) [~~(8)~~] Engineered barrier - A man-made structure or device that is intended to improve the land disposal facility's ability to meet the performance objectives in this subchapter.

(10) [~~(9)~~] Explosive material - Any chemical compound, mixture, or device which produces a substantial instantaneous release of gas and heat spontaneously or by contact with sparks or flame.

(11) [~~(10)~~] Government agency - Any executive department, commission, independent establishment, or corporation, wholly or partly owned by the United States of America or the State of Texas and which is an instrumentality of the United States or the State of Texas; or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the government.

~~[(11) Hazardous wastes - Those wastes designated as hazardous by the EPA rules in 40 Code of Federal Regulations Part 261 as amended through July 1, 1996 (61 FedReg 34278) (Identification and Listing of Hazardous Waste).]~~

(12) - (21) (No change.)

§336.703. Concepts.

The applicant shall consider the concepts provided in 10 Code of Federal Regulations §61.7, as amended.

§336.704. Applications for License of Compact Waste Disposal Facility.

(a) Notwithstanding any other section in this chapter, an application for a license to receive, possess, and dispose of low-level radioactive waste from others at the compact waste disposal facility shall be subject to the application selection process in Subchapter I of this chapter (relating to Compact Waste Disposal Facility Application Selection Process). The license issued under this chapter is the license for the compact waste disposal facility. The commission may not issue more than one license for a single compact waste disposal facility. Licensing of the disposal of federal facility waste must meet the requirements of Subchapters H and J of this chapter (relating to Licensing Requirements for Near- Surface Land Disposal of Low-Level Radioactive Waste; and Federal Facility Waste Disposal Facility).

(b) The compact waste disposal facility licensed under this subchapter is the regional disposal facility established and operated under the compact established under Texas Health and Safety Code, Chapter 403, for purposes of the federal Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 United States Code, §§2021b - 2021j).

§336.705. Content of Application.

An application for a license to receive, possess, and dispose of low-level radioactive waste from other persons by near-surface land disposal shall consist of, but is not limited to, the information specified [~~set forth~~] in Chapter 305 of this title (relating to Consolidated Permits), §336.706 of this title (relating to General Information), §336.707 of this title (relating to Specific Technical Information), §336.708 of this title (relating to Environmental Information), §336.709 of this title (relating to Technical and Environmental Analyses), §336.710 of this title (relating to Institutional Information), and §336.711 of this title (relating to Financial Information).

§336.707. Specific Technical Information.

The specific technical information in the application shall include the following information needed for demonstration that the performance objectives [~~of this subchapter~~] and the applicable technical requirements of this subchapter will be met:

(1) - (5) (No change.)

(6) a description of the types, chemical and physical forms, quantities, classification, and specifications of the radioactive material proposed to be received, possessed, processed, and disposed of at the land disposal facility. This description shall include any prior disposal containing radioactive material at the site. This description shall include performance criteria for form and packaging of the waste or radioactive material that has been previously received and will [~~to~~] be received;

(7) - (11) (No change.)

§336.708. Environmental Information.

(a) The application shall include site-specific environmental information (or reconnaissance-level information when appropriate) which addresses and quantifies to the extent practicable the following:

(1) a statement of need and a description of the proposed activities identifying the location of the proposed site, the character of the proposed activities, and any plans for use of the facility for purposes other than processing and disposal of waste;

(2) proposed time schedules for construction, receipt, processing, and disposal of waste at the proposed facility;

(3) area and site characteristics including ecology, geology (including geotechnical features), seismology, geochemistry, soils, topography, hydrology, air quality, natural radiation background, meteorology, climatology, historical and cultural landmarks, archaeology, demography, and current land uses;

(4) an identification of the known natural resources at the disposal site, whose exploitation could result in inadvertent intrusion into the wastes after removal of active institutional control;

(5) a flow diagram of waste processing and disposal operations, a description and accurate drawings of processing equipment, and any special handling techniques to be employed;

(6) site selection process, including considerations of the interrelationships between location of waste generators, transportation

costs and means, site characteristics, and compatibility with current land uses;

(7) project alternatives, including a discussion of the alternatives considered by the applicant for processing and disposal of waste;

(8) radiological and nonradiological impacts of the proposed action, including:

(A) surface and groundwater impacts;

(B) socioeconomic impacts;

(C) short- and long-term impacts on public health and safety; and

(D) impacts resulting from irreversible or irretrievable commitments of resources;

(9) environmental effects of postulated operational and transportation accidents;

(10) a description of baseline, operational, and long-term environmental monitoring programs, including radioactive and chemical characteristics, and the plan for taking corrective measures if migration of radionuclides or chemical constituents is indicated;

(11) decommissioning and site closure and stabilization plan [~~plans~~], including those design features which are intended to facilitate disposal site closure and to eliminate the need for ongoing active maintenance after closure and an estimated date of site closure, which is to be updated as required; and

(12) a list of all governmental permits, licenses, approvals, and other entitlements obtained in connection with the proposed action.

(b) The applicant shall provide an environmental report under the requirements of 10 Code of Federal Regulations, §§51.45, 51.62, and 61.10, as amended.

§336.709. Technical and Environmental Analyses.

The specific technical and environmental information in the application shall also include the following analyses needed to demonstrate that the performance objectives of this subchapter , referenced in §336.723 of this title (relating to Performance Objectives), will be met:

(1) Pathways analyzed in demonstrating protection of the general population from releases of radioactivity shall include air, soil, groundwater, surface water, plant uptake, and exhumation by animals. The analyses shall clearly identify and differentiate between the roles performed by the natural disposal site characteristics and design features in isolating and segregating the wastes. The analyses shall clearly demonstrate that there is reasonable assurance that the exposures to humans from the release of radioactivity will not exceed the limits specified [~~set forth~~] in §336.724 of this title (relating to Protection of the General Population from Releases of Radioactivity). A minimum period of 1,000 years after closure or the period where peak dose occurs, whichever is longer, is required as the period of analysis to capture the peak dose from the more mobile long-lived radionuclides and to demonstrate the relationship of site suitability to the performance objective in this section to the performance objective in §336.724 of this title.

(2) Analyses of the protection of individuals from inadvertent intrusion shall include demonstration that there is reasonable assurance that the waste classification and segregation requirements will be met and that adequate barriers to inadvertent intrusion will be provided , as required in §336.725 of this title (relating to Protection of Individuals from Inadvertent Intrusion).

(3) Analyses of the protection of individuals during operations shall include assessments of expected exposures due to routine operations and likely accidents during handling, storage, and disposal of waste. The analyses shall provide reasonable assurance that exposures will be controlled to meet the requirements of Subchapter D of this chapter (relating to Standards for Protection Against Radiation) and §336.726 of this title (relating to Protection of Individuals during Operations).

(4) Analyses of the long-term stability of the disposal site and the need for ongoing active maintenance after closure shall be based upon analyses of active natural processes such as erosion, mass wasting, slope failure, settlement of wastes and backfill, infiltration through covers over disposal units and adjacent soils, and surface drainage of the disposal site. The analyses shall provide reasonable assurance that there will not be a need for ongoing active maintenance of the disposal site following closure , as required in §336.727 of this title (relating to Stability of the Disposal Site after Closure).

§336.711. Financial Information.

The financial information in the application shall be sufficient to demonstrate that the financial qualifications of the applicant are adequate to carry out the activities for which the license is sought, in accordance with §336.735 of this title (relating to Applicant Qualifications and Assurances), and meet other financial assurance requirements of this subchapter, including §336.736 of this title (relating to Liability Coverage and Funding for Disposal Site Closure and Stabilization), §336.737 of this title (relating to Funding for Institutional Control), §336.738 of this title (relating to Funding for Corrective Action), and Chapter 37 of this title (relating to Financial Assurance).

§336.716. Terms and Conditions of License.

(a) - (b) (No change.)

(c) The licensee shall be subject to the applicable provisions of the Texas Health and Safety Code, Chapter 401, also known as the Texas Radiation Control Act (TRCA) now or hereafter in effect and to applicable rules and orders of the commission. The terms and conditions of the license are subject to amendment, revision, or modification, by reason of amendments to the TRCA or by reason of rules and orders issued in accordance with terms of the TRCA.

(d) - (g) (No change.)

(h) Each license shall be issued for an initial term of 15 [~~a fixed period of time to be specified in the license but in no case to exceed 20~~] years from the date of issuance. After the initial 15 years, the commission may renew the license for one or more terms of ten years. The authority to dispose of waste expires on the date stated in the license except as provided in §336.718(a) of this title (relating to Application for Renewal or Closure).

(i) The compact waste disposal facility license must require the license holder to indemnify the state for any liability imposed on the state under state or federal law, as required by the commission for the disposal of federal facility waste.

§336.717. Conveyance of Waste.

(a) The compact waste disposal facility license holder shall convey, at no cost to the state, the title to the compact waste delivered to the disposal facility for disposal at the time the waste is accepted at the site. Acceptance occurs when the acceptance criteria specified in the license have been satisfied. This section does not apply to federal facility waste accepted at a federal facility waste disposal facility.

(b) The title and all related rights and interest in compact waste conveyed under this section are the property of the commission on the state's behalf. The commission may administer the waste as property in the name of the state.

§336.718. Application for Renewal or Closure.

(a) Any expiration date on a license applies only to the above ground activities and to the authority to dispose of waste. Failure to renew the license shall not relieve the licensee of responsibility for completing site closure, post-closure observation, and transfer of the license to the custodial agency. An application for renewal or an application for closure under §336.719 of this title (relating to Content of Application for Closure) shall be filed at least one year [~~30 days~~] before license expiration.

(b) - (c) (No change.)

§336.720. Post-closure Observation and Maintenance.

(a) Following completion of closure authorized in §336.719 of this title (relating to Content of Application for Closure), the licensee shall observe, monitor, and carry out necessary maintenance and repairs at the disposal site until the site closure is complete and the license is transferred by the commission in accordance with §336.721 of this title (relating to Transfer of License to Custodial Agency). Responsibility for the disposal site shall be maintained by the licensee for five years. A shorter or longer time period for post-closure observation and maintenance may be established and approved as part of the site closure plan, based on site-specific conditions.

(b) Upon transfer of the license to the custodial agency and transfer of the financial assurance to the perpetual care account, the licensee will be released from the requirements of liability coverage under Chapter 37, Subchapter T of this title (relating to Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste).

§336.723. Performance Objectives [~~General Requirement~~].

Land disposal facilities shall be sited, designed, operated, closed, and controlled after closure so that reasonable assurance exists that exposures to humans are within the limits established in the performance objectives in §336.724 of this title (relating to Protection of the General Population from Releases of Radioactivity), §336.725 of this title (relating to Protection of Individuals from Inadvertent Intrusion), §336.726 of this title (relating to Protection of Individuals during Operations), and §336.727 of this title (relating to Stability of the Disposal Site after Closure).

§336.728. Disposal Site Suitability Requirements for Near-Surface Land Disposal.

(a)- (j) (No change.)

(k) The disposal site shall not be located where nearby facilities or activities could adversely impact the ability of the site to meet the performance objectives of this subchapter or significantly mask the environmental monitoring program. If activities involving radioactive material were previously performed on the site, the applicant shall evaluate the contribution of those activities that may impact the ability of the site to meet performance objectives.

(l) (No change.)

(m) The disposal site shall not be located in a county any part of which is located 62 miles or less from an international boundary.

(n) The disposal site shall not be located in a county in which the average annual rainfall is greater than 20 inches.

(o) The disposal site shall not be located in a county that adjoins river segment 2309, 2310, or 2311 as identified by the commission in the Texas Surface Water Quality Standards in §307.10(3) of this title (relating to Appendices A - E). These river segments are identified as follows:

(1) river segment 2309 is the Devil's River;

(2) river segment 2310 is the lower Pecos River; and

(3) river segment 2311 is the upper Pecos River.

(p) The disposal site shall not be located less than 20 miles upstream of or up-drainage from the maximum elevation of the surface of a reservoir project that:

(1) has been constructed or is under construction by the United States Bureau of Reclamation or the United States Army Corps of Engineers; or

(2) has been approved for construction by the Texas Water Development Board as part of the state water plan under Texas Water Code, Subchapter C, Chapter 16.

§336.729. Disposal Site Design for Near-Surface Land Disposal.

(a) - (f) (No change.)

(g) The design of a disposal facility should incorporate, to the extent practicable, safeguards against hazards resulting from local meteorological conditions, including phenomena such as hurricanes, tornados, violent storms, and susceptibility to flooding, as well as geologic phenomena such as earthquakes and earth tremors.

§336.730. Near-Surface Land Disposal Facility Operation and Disposal Site Closure.

(a) Wastes designated as Class A under §336.362(a) [~~, Appendix E~~] of this title (relating to Appendix E. Classification and Characteristics of Low-Level Radioactive Waste) shall be segregated from other wastes by placing the Class A wastes in disposal units which are sufficiently separated from disposal units for the other waste classes so that any interaction between Class A wastes and other wastes shall not result in the failure to meet the performance objectives specified in §336.723 of this title (relating to Performance Objectives) [~~subchapter~~]. This segregation is not necessary for Class A wastes if they meet the stability requirements in §336.362(b)(2) of this title.

(b) Wastes designated as containerized Class A, Class B, or Class C under §336.362(a) of this title or §336.702 of this title (relating to Definitions) shall be disposed of in the following manner:

(1) within a reinforced concrete container and within a reinforced concrete barrier, or within containment structures made of materials technologically equivalent or superior to reinforced concrete to provide stability after disposal in order to meet the performance objectives set forth in §336.723 of this title;

(2) in such a manner that the waste can be monitored and retrieved; and

(3) so that the top of the waste is a minimum of five meters below the top surface of the cover or shall be disposed of with intruder barriers that are designed to protect against an inadvertent intrusion for at least 500 years.

(c) - (j) (No change.)

§336.733. Waste Classification, Characteristics, and Labeling.

(a) All low-level radioactive waste and mixed waste [~~Waste~~] received for disposal by the licensee shall be classified in accordance with §336.362(a), [~~Appendix E~~] of this title (relating to Appendix E. Classification and Characteristics of Low-Level Radioactive Waste), shall meet the applicable characteristics of §336.362(b) of this title, and shall be labeled in accordance with §336.362(c) of this title.

(b) (No change.)

(c) In addition to the requirements of this chapter, the licensee shall comply with the requirements of Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) for the disposal of mixed waste. The licensee may not dispose of mixed waste unless the licensee is specifically licensed for the disposal of mixed waste under this chapter and permitted under Chapter 335 of this title.

§336.735. Applicant Qualifications and Assurances.

The applicant shall show that it either possesses the necessary funds or has reasonable assurance of obtaining the necessary funds, or by a combination of the two, to cover the estimated costs of conducting all licensed activities over the planned operating life of the project, including costs of construction and disposal. The applicant shall provide proof of funds sufficient to cover any annual license fee and any agency costs of processing the application that may exceed the $500,000 application processing fee.

§336.736. Liability Coverage and Funding for Disposal Site Closure and Stabilization.

(a)- (b) (No change.)

(c) The licensee's financial assurance mechanism and cost estimates shall be reviewed annually by the executive director to assure that sufficient funds are available for completion of the closure plan, assuming that the work has to be performed by an independent contractor.

(d) (No change.)

(e) Before commencement of operations, the applicant shall provide financial assurance for bodily injury and property damage to third parties caused by sudden and non-sudden accidental occurrences arising from operations of the compact waste disposal facility and/or federal facility waste disposal facility in a manner that meets the requirements of Chapter 37 of this title (relating to Financial Assurance).

(f) [~~(e)~~] Financial assurance mechanisms submitted to comply with this section shall meet the requirements specified in Chapter 37, Subchapter T of this title (relating to Financial Assurance for Near-Surface Land Disposal of Radioactive Waste).

§336.737. Funding for Institutional Control.

(a) The licensee shall pay into the perpetual care account [~~Radiation and Perpetual Care Fund~~] an amount determined by the executive director to be adequate to provide surveillance, monitoring, any required maintenance, and other care of the disposal site on a continuing basis during the institutional control period. Unless otherwise specified, the amount of funding provided shall be an amount necessary to provide perpetual surveillance, monitoring, any required maintenance, and other care of the disposal site and the administration of the fund by the state. The amount of funds necessary to provide perpetual care during the institutional control period shall be based upon a real annual rate of interest, above inflation, of 2% (i.e., the amount required is calculated by expressing all costs at an annual rate and multiplying the total annual cost by 50 to calculate an amount that will be self-perpetuating at a real annual interest rate of 2%).

(b) Prior to the commencement of operations [~~During the term of the license before the institutional control period~~], the licensee shall provide the total amount of required funding by means approved by the executive director, such as a combination of periodic payments into the fund and financial assurance covering the remainder of the total amount. Financial assurance mechanisms shall meet the requirements of Chapter 37, Subchapter T of this title (relating to Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste).

(c) (No change.)

§336.738. Funding for Corrective Action.

(a) Prior to the commencement of operations, the licensee shall provide financial assurance for corrective action to address unplanned events that pose a risk to public health and safety that may occur after the decommissioning and closure of the compact waste disposal facility or federal facility waste disposal facility.

(b) The payment schedule and amount shall be determined by the executive director. The amount shall not be less that $20 million at the time the disposal facility site is decommissioned.

(c) Financial assurance under this section shall be established and maintained in accordance with Chapter 37, Subchapter T of this title (relating to Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste).

§336.743. Resident Inspectors [~~Inspector~~].

The commission may require at any disposal site that the licensee provide facilities for two or more resident inspectors [~~a resident inspector who is~~] employed by the commission. The licensee shall reimburse the commission for the salary and other expenses of the inspectors [~~inspector~~], as provided in Subchapter B of this chapter (relating to Radioactive Substance Fees).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2003.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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30 TAC §336.703

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The repeal is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes

the commission to issue licenses for the disposal of radioactive substances.

The proposed repeal implements Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.703. License Required.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER I. COMPACT WASTE DISPOSAL FACILITY APPLICATION SELECTION PROCESS

30 TAC §§336.801, 336.803, 336.805, 336.807 - 336.809, 336.811, 336.813, 336.815, 336.817, 336.819, 336.821, 336.823, 336.825

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The new sections are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed new sections implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.801. Applicability.

(a) License applications to receive, possess, and dispose of low-level radioactive waste from others at the compact waste disposal facility are subject to the application selection process set out in this subchapter. Applications for licenses under this subchapter will be processed as set forth in this subchapter in addition to any procedural requirements applicable to radioactive material licensing in this title. In the event of a conflict between the procedural requirements of this subchapter and other procedural requirements in this title, the requirements of this subchapter shall prevail. Radioactive material licenses authorizing the receipt, possession, and disposal of low-level radioactive waste at the compact waste disposal facility must meet all of the requirements provided in Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) must meet the requirements of Subchapter J of this chapter (relating to Federal Facility Waste Disposal Facility) in addition to the requirements of Subchapter H. License applications under Subchapters F and G of this chapter (relating to Licensing of Alternative Methods of Disposal of Radioactive Material, and Decommissioning Standards) are not subject to this subchapter.

(b) This subchapter addresses the application selection process for the licensing of the disposal of low- level radioactive waste at the compact waste disposal facility. Applications for other authorizations and permits issued by the commission required by the compact waste disposal facility are not subject to the application selection process provided in this subchapter.

§336.803. Receipt of License Applications.

License applications subject to this to subchapter will be received by the commission for a 30-day period, beginning 180 days after the date of the *Texas Register* notice publication for receipt of applications for the siting, construction, and operation of a facility or facilities for disposal of low-level radioactive waste. The executive director shall not evaluate applications received after the 30-day application period.

§336.805. Application Requirements.

In addition to the application requirements provided elsewhere in this title, an application for a license subject to this subchapter must:

(1) comply with Texas Health and Safety Code, Chapter 401, the rules under this title, and any other applicable requirement in the executive director's discretion;

(2) include a nonrefundable $500,000 application processing fee as provided in §336.103(a) of this title (relating to Schedule of Fees for Subchapter H Licenses); and

(3) provide evidence relating to the reasonableness of any technique for managing low-level radioactive waste to be practiced at the proposed disposal facility or facilities including:

(A) studies of alternate techniques of waste processing and reduction at the site of waste generation; and

(B) studies of the use of aboveground isolation facilities.

§336.807. Administrative Review.

(a) Not later than the 45th day after the date an application is received under this subchapter, the executive director shall issue an administrative notice of deficiency to each applicant whose application is timely submitted, but is determined by the executive director to be administratively incomplete.

(b) The executive director shall provide an applicant, for whom an administrative notice of deficiency is issued, not more than three 30-day opportunities to correct the noted deficiencies in the application. For each 30-day opportunity, the executive director will evaluate the information received in response to a notice of deficiency within 30 days. If the required information is not received from the applicant within 30 days of the date of receipt of the deficiency notice, the executive director shall return the incomplete application to the applicant.

(c) The executive director shall reject any application that, after the period for correcting deficiencies has expired, is not administratively complete.

(d) In determining if an application is administratively complete, the executive director shall consider whether the application contains sufficient information that will allow the technical review of the application, including, but not limited to:

(1) the identity and qualifications of the applicant;

(2) a description of the proposed disposal facility or facilities and disposal facility site;

(3) a description of the character of the proposed activities and the types and quantities of waste to be managed at the disposal facility or facilities;

(4) a description of the proposed schedules for construction, receipt of waste, and closure;

(5) a description of the financial assurance mechanism to be used;

(6) a description of the design features of the facility or facilities, along with a description of the methods of construction and operation of the facility or facilities;

(7) a characterization of the area and disposal facility site characteristics, including ecology, geology, soils, hydrology, natural radiation background, climatology, meteorology, demography, and current land uses;

(8) a description of the safety programs to be used at the proposed facility or facilities;

(9) a copy of the warranty deed or other conveyance showing that the right, title, and interest in the land on which the facility or facilities are proposed to be located is owned in fee by the applicant as required by Texas Health and Safety Code, §401.204;

(10) an application processing fee of $500,000 as provided in §336.103(a) of this title (relating to Schedule of Fees for Subchapter H Licenses) and proof of additional funds sufficient to cover any further costs of processing the application as estimated by the commission; and

(11) a copy of a resolution of support of the proposed facility or facilities from the commissioners court of the county in which the facility or facilities are proposed to be located.

§336.808. Ownership of Land and Buildings.

(a) A license application to receive, possess, and dispose of low-level radioactive waste from others at the compact waste disposal facility may not be considered administratively complete unless the applicant has acquired the title to and any interest in land and buildings on which the facility or facilities are to be located. Except as provided in subsection (b) of this section, the applicant must demonstrate ownership of an undivided interest in fee simple title of the land and buildings, including the surface and mineral estates, on which the facility or facilities are to be located.

(b) If an applicant is unsuccessful in acquiring undivided ownership of the mineral estate in fee simple of the land on which the facility or facilities are proposed to be located, the applicant may, to the extent permissible under federal law, request an exemption of the requirement under §336.5 of this title (relating to Exemptions). In addition to the requirements of §336.5 of this title, the applicant must demonstrate that the surface use agreement is permissible under federal law and consistent with the *Agreement Between the United States Nuclear Regulatory Commission And the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the Atomic Energy Act of 1954*, as amended. It is the responsibility of the applicant to apply for and obtain the exemption in a manner that will allow the timely processing of the application under this subchapter. If the requirement of ownership of the mineral estate in fee simple title is exempted under this subsection, the applicant may enter into a surface use agreement that restricts mineral access, including slant drilling and subsurface mining, to the extent necessary to prevent intrusion into the disposal facility site. The surface use agreement shall prohibit the use of the surface in the development and access of the minerals in perpetuity by the owner of the mineral estate, heirs, and successors and shall be assigned to and be enforceable by the state or federal government upon conveyance of the property under §336.710(2) of this title (relating to Institutional Information).

(c) If an applicant cannot reach a surface use agreement and cannot otherwise obtain fee simple title to the mineral estate of the land on which the facility or facilities are proposed to be located, the applicant may petition the commission under §1.8 of this title (relating to Initiation of Proceeding) to request the attorney general to institute condemnation proceedings as provided under Texas Property Code, Chapter 21, to acquire fee simple interest in the mineral rights. The petition to request initiation of condemnation proceedings shall include a description of the communications between the applicant and the mineral estate interest owner, an appraisal of the fair market value of the mineral interest, and a demonstration by the applicant of the ability to pay for all costs in obtaining the mineral interests in condemnation proceedings, including legal fees. The applicant shall provide a copy of the petition under this subsection to the owner of the mineral interest. If the petition is granted and the commission requests the attorney general to initiate condemnation proceedings, the applicant shall pay for all costs incurred by the commission in the process of obtaining the mineral interests, whether or not the mineral interests are successfully condemned. It is the responsibility of the applicant to acquire fee simple interest in the mineral interests in a manner that will allow the timely processing of the application under this subchapter.

§336.809. Notice of Declaration of Administrative Completeness.

When an application under this subchapter has been declared administratively complete, notice shall be provided under §39.702 of this title (relating to Notice of Declaration of Administrative Completeness). The applicant shall pay for all costs of issuing notice under this subchapter.

§336.811. Public Meeting.

(a) The executive director shall conduct at least one public meeting in the county or counties where a compact waste disposal facility or federal facility waste disposal facility is proposed to be located to receive public comments on the administratively complete applications as provided in §55.253 of this title (relating to Public Comment Processing). The applicant shall pay for the costs of providing notice of the public meeting and for the costs of holding the public meeting.

(b) The applicant shall publish notice of the public meeting in accordance with §39.405(f)(1) of this title (relating to General Notice Provisions), once each week during the three weeks preceding the public meeting. The notice shall include:

(1) the applicant's name;

(2) a description of the proposed activity;

(3) the proposed location of the compact waste disposal facility;

(4) the location and availability of the application;

(5) the location, date, and time of the public meeting; and

(6) the name, address, and telephone number of the contact person for the applicant from whom interested persons may obtain further information.

(c) The chief clerk shall mail notice of the public meeting to persons listed in §39.413 of this title (relating to Mailed Notice).

§336.813. Evaluation of Applications.

(a) The executive director shall prepare a written evaluation of each administratively complete application in terms of the criteria established under §§336.815, 336.817, 336.819, and 336.821 of this title (relating to Tier 1 Criteria, Tier 2 Criteria, Tier 3 Criteria, and Tier 4 Criteria).

(b) The executive director may issue a request for further information to each applicant whose administratively complete application is determined by the executive director to be insufficient for the purposes of the evaluation required in this section. An applicant, for whom a request for further information is issued, may be provided two 30-day opportunities to respond to the request at the discretion of the executive director.

(c) The executive director shall use the written evaluations and application materials to evaluate each application according to the criteria established by §§336.815, 336.817, 336.819, and 336.821 of this title. The executive director shall evaluate each application for each criterion for purposes of comparing the relative merit of the application, giving:

(1) equal weight to each criterion within a tier of criteria; and

(2) the greatest weight to Tier 1 criteria, greater weight to Tier 2 criteria than to Tier 3 criteria, and the least weight to Tier 4 criteria.

(d) Not later than the 270th day after receipt of the last timely filed application, the executive director, based on the written evaluations and application materials, shall select the application that has the highest comparative merit for technical review under §336.823 of this title (relating to Technical Review). If the selected application is rejected or denied by the commission, the executive director may select the application with the next highest comparative merit and proceed with the technical review under §336.823 of this title.

§336.815. Tier 1 Criteria.

(a) The commission shall consider as Tier 1 criteria:

(1) the natural characteristics of the disposal facility site for a proposed disposal facility or facilities;

(2) the adequacy of the proposed facility or facilities and activities to safely isolate, shield, and contain low-level radioactive waste from mankind and mankind's environment; and

(3) the adequacy of financial assurance related to the proposed activities.

(b) Natural characteristics of the disposal facility site include:

(1) the suitability of the site for the proposed activities, including the site's:

(A) geological characteristics;

(B) topography, including features relating to erosion;

(C) surface and underground hydrology;

(D) meteorological factors; and

(E) natural hazards;

(2) the compatibility of disposal activities with any uses of land near the site that could affect the natural performance of the site or that could affect monitoring of the disposal facility or facilities and disposal facility site;

(3) the adequacy of plans for the collection of prelicense monitoring data and background monitoring plans for the disposal facility site, including analysis of the ambient conditions of the site and established trends of the site's natural parameters, including:

(A) natural background radioactivity levels;

(B) radon gas levels;

(C) air particulate levels;

(D) soil characteristics, including chemical characteristics;

(E) surface water and groundwater characteristics; and

(F) flora and fauna at the site;

(4) the possible effects of disposal activities on flora and fauna at or near the site; and

(5) the ease of access to the site.

(c) Adequacy of the proposed disposal facility or facilities and activities includes:

(1) the capability of the proposed facility or facilities and activities to isolate, shield, and contain low-level radioactive waste in conformity with federal standards;

(2) acceptable operational safety; and

(3) acceptable long-term safety as demonstrated by analysis or study.

(d) Financial assurance criteria include:

(1) adequacy of the applicant's financial qualifications to:

(A) conduct the licensed activities as proposed, including:

(i) any required decontamination, decommissioning, reclamation, or disposal; and

(ii) control and maintenance of the disposal facility site and facility or facilities after the cessation of active operations; and

(B) address any unanticipated extraordinary events that would pose a risk to public health and safety and the environment and that may occur at the disposal facility site after decommissioning and closure of the disposal facility or facilities;

(2) the adequacy of the applicant's financial assurance in an amount and type acceptable to the commission and adequate to cover potential injury to any property or person;

(3) the adequacy of the applicant's financial security, as required by commission rules; and

(4) the degree of certainty that the applicant will be able to maintain adequate financial security.

§336.817. Tier 2 Criteria.

The commission shall consider as Tier 2 criteria:

(1) the suitability of facilities at the site that are associated with proposed activities and the adequacy of their engineering and design; and

(2) the suitability of the proposed disposal facility or facilities for the chemical, radiological, and biological characteristics of the low-level radioactive waste as classified under the system established under Texas Health and Safety Code, §401.053.

§336.819. Tier 3 Criteria.

The commission shall consider as Tier 3 criteria the applicant's:

(1) technical qualifications to receive, store, process, and dispose of low-level radioactive waste;

(2) experience in management and disposal of low-level radioactive waste and other radioactive materials;

(3) previous operating practices in this state and elsewhere, including the practices of a parent, subsidiary, or affiliated entity of the applicant, related to radioactive materials;

(4) record of compliance with environmental statutes, rules, and licenses in this state and in any other jurisdiction, including the records of a parent or subsidiary of the applicant, subject to Texas Health and Safety Code, §401.243;

(5) training programs proposed for its employees whose duties relate to the proposed disposal facility site and activities;

(6) monitoring, recordkeeping, and reporting plans;

(7) low-level radioactive waste spill detection and cleanup plans for the proposed disposal facility site and activities;

(8) decommissioning and post-closure plans;

(9) security plans;

(10) monitoring and protection plans for workers;

(11) emergency plans;

(12) plans for background monitoring during the license period, including analysis of the ambient conditions of the disposal facility site and analysis of established trends of the disposal facility site's natural parameters, including:

(A) natural background radioactivity levels;

(B) radon gas levels;

(C) air particulate levels;

(D) soil characteristics, including chemical characteristics;

(E) surface water and groundwater characteristics; and

(F) flora and fauna at the site; and

(13) ability to adequately manage the proposed disposal facility or facilities and activities for the term of the license.

§336.821. Tier 4 Criteria.

The commission shall consider as tier 4 criteria:

(1) the compatibility of uses of land near the proposed disposal facility site that could be affected by the construction and operation of the disposal facility or facilities; and

(2) possible socioeconomic effects on communities in the host county of:

(A) the proposed disposal facility or facilities;

(B) the operation of the proposed disposal facility or facilities; and

(C) related transportation of low-level radioactive waste to the disposal facility or facilities.

§336.823. Technical Review.

Upon selection of the application that has the highest comparative merit in accordance with §336.813 of this title (relating to Evaluation of Applications), the executive director shall begin the technical review of the selected application in accordance with §281.19 of this title (relating to Technical Review). The executive director shall give priority to the review of the selected application over all other radioactive materials licensing and registration matters pending before the commission.

§336.825. Delegation.

The commission delegates to the executive director the authority to review and evaluate applications for radioactive materials licenses under this subchapter and to select the one application under §336.813 of this title (relating to Evaluation of Applications) for further technical review. A decision by the executive director under §336.813 of this title is not appealable to the commission until the commission makes a final decision on the selected license application.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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SUBCHAPTER J. FEDERAL FACILITY WASTE DISPOSAL FACILITY

30 TAC §§336.901, 336.903, 336.905, 336.907, 336.909

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The new sections are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of LLRW; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed new sections implement Texas Health and Safety Code, as amended by HB 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§336.901. Applicability.

This subchapter provides additional licensing requirements to the requirements of Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste); and other rules of this title for the disposal of federal facility waste at a separate disposal unit at the compact waste disposal facility. Applications for the licensing of the disposal of federal facility waste

shall demonstrate compliance with the provisions of this subchapter in addition to other application requirements of this title. The commission may license federal facility waste disposal only at a separate and distinct disposal unit that is operated exclusively for the disposal of federal facility waste and that is adjacent to the compact waste disposal facility.

§336.903. Receipt of Waste.

(a) The compact waste disposal facility license holder may not accept federal facility waste for disposal unless the compact waste disposal facility license holder is licensed for the disposal of federal facility waste under the requirements of this subchapter and other licensing requirements of this title.

(b) The licensee may not accept federal facility waste at a federal facility waste disposal facility until the licensee begins accepting compact waste at the compact waste disposal facility. "Begins accepting" means accepting compact waste at a licensed and constructed compact waste disposal facility that the executive director has approved for acceptance and disposal of low-level radioactive waste.

§336.905. Volume Limitation.

(a) For the first five years after a license is issued under this subchapter, the license shall limit the overall capacity of the federal facility waste disposal facility to not more than three million cubic yards. Of that amount, the total volume of low-level radioactive waste accepted at the federal facility waste disposal facility that must be disposed of in accordance with §336.730 of this title (relating to Near-Surface Land Disposal Facility Operation and Disposal Site Closure) shall be limited to not more than 300,000 cubic yards.

(b) Upon application for license amendment under §305.62 of this title (relating to Amendment) and after five years from the date of licensing of the disposal of federal facility waste under this subchapter, the capacity of the federal facility waste disposal facility may be increased by three million cubic yards for a total capacity of six million cubic yards upon a determination by the commission that increasing the capacity of the federal facility waste disposal facility would not pose a significant risk to human health, public safety, or the environment. Of the increased amount, the volume of waste that must be disposed of in accordance with §336.730 of this title may be increased by not more than 300,000 cubic yards for a total volume of 600,000 cubic yards.

§336.907. Prohibition of Commingling of Waste.

The commingling of compact waste and federal facility waste is prohibited. If licensed to dispose of federal facility waste, the licensee shall maintain separate waste transport, acceptance, storage, processing, and disposal of compact waste and federal facility waste.

§336.909. Additional Responsibilities.

If licensed to dispose of federal facility waste, the licensee shall:

(1) arrange for and pay the costs of management, control, stabilization, and disposal of federal facility waste and the decommissioning of the licensed federal facility waste disposal activity;

(2) before accepting federal facility waste, submit to the commission a written agreement, acceptable to the executive director and signed by a federal government official, stating that the federal government will assume all right, title, and interest in land and buildings acquired under §336.710 of this title (relating to Institutional Information) for the disposal of federal facility waste, together with requisite rights of access to the land and buildings;

(3) before termination of the license, formally convey to the federal government the right, title, and interest in federal facility waste located on the property conveyed;

(4) transfer federal facility waste, land, and buildings to the federal government without cost to the state or federal government, other than the administrative and legal costs incurred in making the transfer; and

(5) indemnify the state, and its officers and agents, for any liability imposed on the state under state or federal law for damages, removal, or remedial action with respect to the land, the facility, or the waste accepted, stored, or disposed of, because the transfer does not relieve a license holder of liability for any act or omission before or following the transfer. This indemnification does not relieve the license holder of providing financial assurance for decommissioning, institutional control, and after decommissioning, corrective action.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 18. TEXAS GROUNDWATER PROTECTION COMMITTEE

CHAPTER 601. GROUNDWATER CONTAMINATION REPORT

SUBCHAPTER B. NOTICE OF GROUNDWATER CONTAMINATION

31 TAC §601.10

The Texas Groundwater Protection Committee (committee) proposes new §601.10, Form and Content of Groundwater Contamination Notice.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

House Bill 3030, 78th Legislature, 2003, added §26.408 to the Texas Water Code (TWC), Chapter 26. The new section contains the following provisions: 1.) a requirement that a state agency notify the Texas Commission on Environmental Quality (TCEQ) if a case of groundwater contamination under TWC, §26.406(a), is documented that may affect a drinking water well; 2.) a requirement that the TCEQ make every effort to provide notice to the owners of private drinking water wells that may be affected by the contamination and to applicable groundwater conservation districts by first-class mail within 30 days of receiving a notification or of obtaining independent knowledge of groundwater contamination; and 3.) a requirement that the committee prescribe by rule, the form and content of the groundwater contamination notice. This rulemaking implements the third requirement by establishing the form and content of the notices that are to be provided by TCEQ under TWC, §26.408.

SECTION DISCUSSION

The committee proposes new §601.10, Form and Content of Groundwater Contamination Notice, in new Subchapter B, Notice of Groundwater Contamination. When required by TWC, §26.408, the proposed rule prescribes the form and content of a written notice to be provided by TCEQ to the owner of a private drinking water well that may be affected by contamination and to each applicable groundwater conservation district.

The proposed rule uses the existing definition of contamination contained in §601.3(7) of this chapter (relating to Definitions). Under that definition, which was derived from TWC, Chapter 26, contamination is the detrimental alteration of the naturally occurring physical, thermal, chemical, or biological quality of groundwater. Furthermore, the definition of groundwater contamination is limited to: 1.) contamination reasonably suspected of having been caused by activities or by entities under the jurisdiction of the agencies on the committee having responsibilities related to the protection of groundwater; and 2.) is limited to groundwater that contains a concentration of less than, or equal to, 10,000 milligrams per liter (mg/L) of dissolved solids, or to groundwater with greater than 10,000 mg/L of dissolved solids that is currently extracted for beneficial use such as domestic, industrial, or agricultural purposes, or is hydrologically connected with, and has the potential for contaminant movement to, a surface water body or another zone of groundwater that has a concentration of less than, or equal to, 10,000 mg/L of dissolved solids. An exception to the definition is provided in the case of an underground source of drinking water granted an aquifer exemption by TCEQ with concurrence from the United States Environmental Protection Agency.

The proposed rule requires that the written notice contain the following information: 1.) the name of the contaminant or contaminants; 2.) the range of analytical results for the contaminant or contaminants measured in the area or well to date; 3.) possible health effects of the contaminant or contaminants; 4.) possible source or sources for this type of contamination; 5.) suggested actions and precautions potentially impacted well owners could take; and 6.) who to contact for more information.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Mary Ambrose, designated chairman of the committee, determined that, during the first five-year period the proposed new section is in effect, there will be no fiscal implications for state and local government as a result of the administration of the proposed section. The rule implements a requirement of TWC, §26.408, by prescribing by rule the form and content of certain notices to be provided by TCEQ under certain conditions. The provisions in the rule are not expected to add substantially more information to the notices nor to require substantially more staff time to prepare the notices than would be required under TWC, §26.408. Because the rule only applies to the notices provided by TCEQ, no impact is expected for other units of government.

PUBLIC BENEFITS AND COSTS

Ms. Ambrose also determined that, for the first five years the new section as proposed is in effect, the public benefit anticipated as a result of this proposed rule will be improved information for private well owners and applicable groundwater conservation districts regarding contamination that may affect drinking water wells. No costs to individuals from this proposed rule are anticipated because the new section only prescribes the form and content of certain notices to be provided by TCEQ.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small businesses or micro-businesses as a result of implementation of the proposed new section, which is intended to specify the form and content of certain notices provided by TCEQ, as required by TWC, §26.408(c).

LOCAL EMPLOYMENT IMPACT STATEMENT

The committee reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule, which prescribes the form and content of certain groundwater contamination notices provided by TCEQ, does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The committee reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in §2001.0225(g)(3). The proposed rulemaking implements legislative requirements in new TWC, §26.408(c), regarding the content of certain notices to be provided by TCEQ. Because the proposed new section only prescibes the form and content of the notice, it is not expected to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Furthermore, even if the proposed rule did meet the definition of a "major environmental rule," the proposed rule is not subject to §2001.0225 because it does not accomplish any of the four results specified in §2001.0225(a).

First, the proposal does not exceed a standard set by federal law because there is no equivalent federal statute that prescribes the form and content of a notice to a groundwater conservation district or to the owner of a private of drinking water well that may be affected by contamination. Second, this proposal does not exceed an express requirement of state law. The committee is specifically authorized under new TWC, §26.408(c), as added by House Bill 3030, 78th Legislature, 2003, to adopt a rule defining the form and content of the notices to be provided by TCEQ to the owner of a private drinking water well that may be affected by contamination and to each applicable groundwater conservation district. Third, this proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because this notice is not part of a delegation agreement or contract between the state and a federal program. Finally, this proposal does not adopt a rule solely under the general powers of the committee instead of under a specific state law. The new section is specifically proposed under TWC, §26.408(c).

The committee invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The committee prepared a takings impact assessment for this rule in accordance with Texas Government Code, §2007.043. The purpose of this rulemaking is to define the form and content of the written notice to the owner of a private drinking water well that may be affected by contamination and each applicable groundwater conservation district to be provided by TCEQ. The rule provides the form and the minimum content of notices to be

provided by TCEQ, as required by new TWC, §26.408(b), concerning Notices of Groundwater Contamination. Because the rule governs the actions of a member agency on the committee, it does not affect private real property and does not, in whole or in part, or temporarily or permanently, restrict or limit a property owner's right to the property that would otherwise exist in the absence of the rule.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The committee reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Because TCEQ provides all administrative assistance to the committee, written comments may be submitted to Lola Brown, Texas Commission on Environmental Quality, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-044-601-WT. Comments must be received by 5:00 p.m., September 22, 2003. For further information or questions concerning this proposal, please contact Mary Ambrose, designated chairman of the committee, TCEQ, Office of Environmental Policy, Analysis, and Assessment, at (512) 239-4813 or Joseph Thomas, TCEQ, Office of Environmental Policy, Analysis, and Assessment, at (512) 239-4580.

STATUTORY AUTHORITY

The new section is proposed under House Bill 3030, 78th Legislature, 2003, and TWC, §26.408, which authorizes the committee to prescribe the form and content of the notices to be provided by TCEQ to the owner of a private drinking water well that may be affected by contamination and to each applicable groundwater conservation district. In addition, the new section is proposed under TWC, §26.405, which establishes the general powers and duties of the committee, as well as under TWC, §26.406, which establishes the committee's authority to adopt rules defining the conditions that constitute groundwater contamination for purposes of including such information in files available for public inspection as well as in the joint report required to be filed by the committee in conjunction with member agencies having responsibilities related to the protection of groundwater.

The proposed new section implements TWC, §26.408.

§601.10. Form and Content of Groundwater Contamination Notice.

When notice of groundwater contamination, as defined in §601.3(7) of this title (relating to Definitions), is provided under Texas Water Code, §26.408 to the owner of a private drinking water well that may be affected by the contamination and to each applicable groundwater conservation district, the notice shall:

(1) be in writing; and

(2) contain, at a minimum, the following information:

(A) the name of the contaminant or contaminants;

(B) the range of analytical results for the contaminant or contaminants measured in the area or well to date;

(C) possible health effects of the contaminant or contaminants;

(D) possible source or sources for this type of contamination;

(E) suggested actions and precautions potentially impacted well owners could take; and

(F) who to contact for more information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2003.

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Stephanie Bergeron
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Texas Groundwater Protection Committee
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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 25. MEMBERSHIP CREDIT

SUBCHAPTER B. COMPENSATION

34 TAC §25.34

The Teacher Retirement System of Texas (TRS) proposes a new §25.34, concerning the administration of membership waiting period for public education employees. The proposed new section implements a waiting period before an individual is eligible to become a member of TRS. The proposal has been adopted on an emergency basis and is published in this issue of the *Texas Register*.

In accordance with House Bill 3459, 78th Legislature, Regular Session, the proposed new section sets forth the requirement of a 90-day waiting period for an individual who is not a member of TRS, including through withdrawal of contributions, if the individual is employed on or after September 1, 2003, by an entity otherwise required to report its employees to TRS as members. The proposed new section sets forth the eligibility for TRS membership for individuals who are subject to the waiting period; describes the date of employment for the purpose of administering the section; establishes how the waiting period is calculated, and addresses the effect of the waiting period on eligibility to elect participation in the Optional Retirement Program ("ORP") as an alternative to membership in TRS.

Tony Galaviz, Chief Financial Officer, has determined that for each year of the first five years the proposed section will be in effect, there will be negligible fiscal implications to state or local governments as a result of enforcing or administering the section as proposed. There will be no measurable effect on local employment or the local economy as a result of the proposal. Any economic costs to local governments required to comply with the proposed new rule are the result of the legislative enactment of House Bill 3459, 78th Legislature, Regular Session.

Mr. Galaviz has also determined that the public benefit will be to provide notice and clarification to employers of the provisions

relating to the 90-day membership waiting period for affected employees. He has also determined that there will be no anticipated economic cost to the public, small businesses, or to the persons who are required to comply with the section as proposed for each year of the first five years the section will be in effect.

Comments may be submitted in writing to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than 30 days after publication of the sections for proposal.

The new section is proposed under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for eligibility for membership. The new section is also proposed under House Bill 3459, 78th Legislature, Regular Session, sections 43-44 and 73-74, which require a waiting period and otherwise address implementation of the waiting period.

The other code provisions affected are Government Code, Chapter 822, §822.001 and Government Code, Chapter 823, §823.002.

§25.34. Administration of Membership Waiting Period.

(a) For an individual who begins employment on or after September 1, 2003, with an employer that is a TRS reporting entity and who is not a member of TRS as of the date of employment, eligibility for TRS pension plan membership begins on the first calendar day after the end of a 90 calendar day waiting period.

(b) For purposes of this section, an individual who is not considered to be a TRS member includes an individual who previously terminated membership in the retirement system through withdrawal of contributions and did not resume membership prior to a date of employment that is on or after September 1, 2003.

(c) In determining the date of eligibility for TRS pension plan membership for an employee who is subject to the waiting period, the following provisions apply:

(1) An employer shall count the date of employment as the first day of the 90-day waiting period.

(2) An employer shall count calendar days of an employment period on or after September 1, 2003, towards the waiting period, regardless of whether the days are in different school years.

(3) An employer shall count calendar days on or after September 1, 2003, during which the individual previously served as an employee with another TRS reporting entity towards the waiting period.

(4) An employer shall not count any calendar days between periods of employment towards the waiting period.

(5) Service provided by an employee on one calendar day to more than one employer that is a TRS reporting entity shall count as only one calendar day in the waiting period. Service of a type that would not otherwise qualify the employee for TRS membership may not fulfill any part of the waiting period requirement.

(d) For the purpose of administering this section, the date of employment means the date on which an employee begins to perform service for an employer that is a TRS reporting entity and the service is of a type that would otherwise qualify the employee for membership in the TRS pension plan, as provided under Subchapter A of this chapter (relating to Service Eligible for Membership) if the person were not subject to the waiting period described in this section.

(e) An employer shall submit member and other required contributions to TRS on compensation paid to an employee after the first date of the employee's eligibility for membership. For an employee subject to the waiting period, an employer's first report to TRS for the employee shall include the date of employment and the date on which the employee became eligible for TRS membership after the waiting period.

(f) An employer shall notify TRS immediately if it has failed to report an employee who was eligible for TRS membership and shall begin to report the employee as a member no later than the month immediately following the month in which the employer discovered the error. The employer shall correct any previous reports filed with TRS and make contributions and deposits as required by this title.

(g) Because participation in the Optional Retirement Program ("ORP") under Government Code, Chapter 830, is in lieu of participation in TRS, a person employed on or after September 1, 2003, and otherwise eligible to elect to participate in ORP must meet the TRS membership eligibility requirements, including the waiting period as applicable under this section, before the person may elect to participate in ORP. An election to participate in ORP must be made before the 91st day after becoming eligible to make the election, as required by Government Code, Chapter 830, §830.102, but may not be made before the date on which an employee is eligible for TRS membership.

(h) Upon request by TRS, an employer or an employee shall provide copies of, or otherwise make available, any records that TRS determines are necessary to administer this section.

(i) An employee who is subject to the waiting period specified in this section may be eligible to receive a year of TRS service credit if the employee is employed in a TRS-covered position and participates as a contributing member of TRS for the amount of time in a school year required by this title, including §25.1 of this title (relating to Full-Time Service) and §25.131 of this title (relating to Required Service). Employment service prior to the date on which a person is eligible for TRS membership under this section may not be used to meet the minimum requirements for service creditable in a school year unless a member purchases it in accordance with applicable requirements.

(j) This section is effective on September 1, 2003, and expires September 1, 2005, unless legislation is enacted extending the provisions of Government Code, Chapter 822, §822.001 and Government Code, Chapter 823, §823.002, as amended by House Bill 3459, 78th Legislature.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304891
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: September 25, 2003
For further information, please call: (512) 542-6115

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CHAPTER 53. CERTIFICATION BY COMPANIES OFFERING QUALIFIED INVESTMENT PRODUCTS

34 TAC §§53.1, 53.6, 53.14

The Teacher Retirement System of Texas (TRS) proposes amendments to §53.1, §53.6, and §53.14 concerning certification by companies offering qualified investment products to members. §53.1 defines terms used in the chapter, §53.6 sets

forth the procedure for certification of qualified companies, and §53.14 sets out the requirements for qualified companies to re-certify.

The proposed amendment to §53.1 deletes the definition of "school year" as it is no longer necessary. The proposed amendments to §53.6 eliminate the requirement that a company submit its certification by June 1st before the beginning of the school year in which it wishes to offer qualified investment products to school employees. The proposed amendments also clarify the period that the certification remains in effect. The proposed amendments to §53.14 eliminate the June 1st deadline for filing a re-certification and indicate that re-certifications should be filed no later than thirty days prior to the expiration of its certification.

Tony Galaviz, Chief Financial Officer, has determined that for each year of the first five-year period the sections are in effect there will be no foreseeable fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Galaviz also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated would be that qualified companies will be able to certify at a time of their choosing, according to their business needs, thus increasing the choices available to educational employees. Mr. Galaviz has also determined that there are no anticipated economic costs to the public, small businesses, or to the persons who are required to comply with the sections as proposed for each year of the first five years the sections will be in effect.

Comments on the proposal may be submitted in writing to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than 30 days after publication of the proposal.

The amendments are proposed under article 6228-a-5, Vernon's Texas Civil Statutes, which authorizes the TRS Board of Trustees to adopt rules to, among other things, administer the certification of companies offering eligible qualified investment products to educational employees. The amendments are also proposed under Government Code, Chapter 825, §825.102, which authorizes the TRS Board of Trustees to adopt rules for the transaction of business of the Board.

No other codes are affected by the proposal.

§53.1. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (13) (No change.)

(14) [~~School year--a twelve-month period established by an educational institution as its school year and, for purposes of this chapter, beginning after June 1 of a calendar year.~~]

[~~(15)~~] Specialized department--One or more employees of a certified company or a company affiliated with the certified company dedicated to service of qualified investment products. If the certified company is authorized by the Texas Department of Insurance to issue annuity contracts in the State of Texas, the affiliated company must be part of an Insurance Holding Company system as defined in Article 21.49-1, Insurance Code.

§53.6. Procedure for Certification.

(a) A company that meets the qualifications for certification may certify to TRS that it offers one or more qualified investment products, which shall be identified in the certification as annuity contracts, qualified investment products other than annuity contracts, or both.

(b) A company certifies to TRS by providing all information required in this chapter on a form promulgated by TRS for this purpose and by paying the required certification fee.

(c) As part of its certification to TRS, a company shall affirm that each of its representatives is properly licensed and qualified, by training and continuing education, to sell and service the company's eligible qualified investments and that the company will demonstrate this annually to TRS, as required by Texas Civil Statutes, Article 6228a-5, §12.

(d) For a company filing a certification on or after September 1, 2002, certification remains in effect for five years from the date on which TRS verifies by letter that all required information has been provided and the required fee has been paid, making the company eligible to be placed on the list of certified companies. [~~A certifying company shall file its certification with TRS no later than June 1 in order to offer eligible qualified investment products during the school year beginning after June 1 in the same calendar year.~~]

(e) For a company that filed its certification with TRS before September 1, 2002, certification remains in effect through August 31, 2007. [~~Notwithstanding subsection (d) of this section, a company may file its certification after June 1, 2002, but no later than December 31, 2002, in order to be eligible to offer qualified investment products during the remainder of the 2002-2003 school year following certification by the company.~~]

[~~(1) This subsection does not authorize a company to offer qualified investment products after June 1, 2002, without having certified to TRS.~~]

[~~(2) A company that files its certification under this subsection nevertheless is subject to the June 1 filing requirement of subsection (d) of this section in the calendar year 2007 if it wishes to offer qualified investment products during the entire 2007-2008 school year.~~]

(f) A certifying company shall pay the certification fee established by this chapter to TRS at the time it certifies to TRS.

(g) A certified company has an on-going duty to correct any erroneous or misleading information provided to TRS in the certification process. A company shall notify TRS within 30 calendar days of a change in the information provided in its certification if such a change affects the accuracy of the company's certification or its eligibility for certification.

(h) TRS may reject a company's certification if the company does not provide all required information, if the information provided indicates the company does not meet the requirements for certification, or if TRS receives notification of a violation regarding the company or the company's product from either the Texas Department of Insurance, the State Securities Board, or the company.

(i) Rejection of certification is final but a company may re-certify if it subsequently submits information or corrections that show it meets the requirements for certification. Additional or corrective information filed within 30 business days following a rejection of certification shall not require payment of an additional certification fee.

(j) Certification remains in effect in accordance with the provisions of this section [~~for five school years~~] unless revoked by TRS.

§53.14. Re-certification.

(a) A company may re-certify to TRS following expiration, rejection, or revocation of its certification.

(b) In order to re-certify, a company shall provide all information required for certification and shall pay the certification fee in effect at the time re-certification is filed.

(c) To re-certify following rejection or revocation of certification, a company must specifically demonstrate that the grounds for rejection or revocation have been remedied.

(d) A company should [~~shall~~] file its re-certification with TRS no later than thirty days prior to the expiration of its certification in order to allow adequate time for review by TRS [~~June 1 in order to offer eligible qualified investments during the school year beginning after June 1 in the same calendar year~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304971
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: September 25, 2003
For further information, please call: (512) 542-6115

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS
SUBCHAPTER UU. ELECTRONIC BENEFIT TRANSFER (EBT)

40 TAC §3.7417

The Texas Department of Human Services (DHS) proposes to amend §3.7417, concerning What happens to EBT benefits a TANF or food stamp household does not use?, in its Texas Works chapter. The purpose of the amendment is to change the point at which certain Electronic Benefit Transfer (EBT) food accounts are placed on hold. Under the proposal, the EBT system will continue to place food accounts on hold when there is no activity for three consecutive months. However, the proposal adds a provision that, if the most recent monthly issuance from the food account is less than $20, then the food account is not placed on hold until there is no activity for six consecutive months.

Bobby Halfmann, Chief Financial Officer, has determined that, for the first five-year period the proposed section is in effect, there are no fiscal implications for state or local government as a result of enforcing or administering the section.

Judy Denton, Deputy Commissioner for Family Services, has determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section is that elderly clients on fixed incomes with monthly allotments of less than $20 can use their food stamp benefits less frequently without the account going dormant. In addition, DHS staff will spend less time on clearing reports generated by dormant accounts and more time in determining accurate and timely benefits for clients. There is no adverse economic effect on small or micro businesses, or businesses of any size, or any anticipated economic cost to persons required to comply with the proposed section, because the software changes needed to implement this proposal are covered by the vendors' contract with DHS. There is no anticipated effect on local employment in geographic areas affected by this section.

Questions about the content of this proposal may be directed to Eric McDaniel at (512) 438- 2909 in DHS's Texas Works Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-302, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Government Code, DHS has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, DHS is not required to complete a takings impact assessment regarding this rule.

The amendment is proposed under the Human Resources Code, Chapters 31 and 33, which authorizes DHS to administer financial and nutritional assistance programs.

The amendment implements the Human Resources Code, §§31.001 - 31.081 and §§33.001 - 33.027.

§3.7417. What happens to EBT benefits a TANF or food stamp household does not use?

When a household fails to access the EBT cash account for three consecutive months or the food account for three consecutive months (or six consecutive months when the most recent monthly issuance is less than $20), the EBT vendor:

(1) - (2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304893
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 438-3734

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CHAPTER 54. FAMILY VIOLENCE PROGRAM
SUBCHAPTER B. SHELTER CENTERS
DIVISION 6. PROGRAM ADMINISTRATION

40 TAC §§54.604, 54.605, 54.650, 54.651

The Texas Department of Human Services (DHS) proposes to amend §54.604, concerning When is a person less than 18 years old eligible to receive 24-hour-a-day shelter?, and §54.605, concerning Can a minor receive Texas Department of Human Services (DHS)-contracted nonresidential services if the parent is not receiving services?; and proposes new §54.650, concerning Are there any limitations to providing shelter or care to family

violence victims who are less than 18 years old who are not accompanied by a parent or legal guardian, are not legally emancipated, are not married, or have not been married?, and §54.651, concerning Are there any limitations to providing nonresidential services to family violence victims who are less than 18 years old who are not accompanied by a parent or legal guardian, are not legally emancipated, are not married, or have not been married?, in its Family Violence Program chapter. The purpose of the amendments and new sections is to implement provisions of House Bill 1364, 78th Texas Legislature, which amended the Family Code, §32.201, and created §32.202. The statutes allow emergency shelters to provide shelter or care to minors who are less than 18 years old and to their children. The amendments reinforce the recently expanded legislative authorization for emergency shelter facilities to provide shelter and nonresidential services to minors without children by deleting the criterion that the minor be a minor mother. The amendments also allow shelter centers to rely on the minor's written statement containing the grounds on which he or she can consent to emergency shelter or care. The new sections let shelter centers provide up to 15 days of service to minors with or without children, and provide services beyond 15 days with the minor's consent if the minor is 16 years old or older; lives apart from his or her parent, managing conservator, or guardian; and manages his or her own financial affairs. Extended services also can be provided if the minor is unmarried and pregnant, unmarried with custody of a child, or has qualified for assistance under the Temporary Assistance for Needy Families Program authorized in the Human Resources Code, Chapter 31, and is on the waiting list for housing assistance.

Bobby Halfmann, Chief Financial Officer, has determined that, for the first five-year period the proposed sections are in effect, there are no fiscal implications for state or local government as a result of enforcing or administering the sections.

Judy Denton, Deputy Commissioner for Family Services, has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections is that more minors who are victims of family violence will be able to obtain emergency shelter and other services on their own behalf. There is no adverse economic effect on small or micro businesses as a result of enforcing or administering the sections because family violence service providers are required to be nonprofit organizations and do not qualify as small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Terri St. Arnauld at (512) 438-3397 in DHS's Family Violence Program. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-270, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Government Code, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

The amendments and new sections are proposed under the Human Resources Code, Chapter 51, which provides DHS with the authority to administer family violence programs.

The amendments and new sections implement the Human Resources Code, §§51.001 - 51.012.

§54.604. When is a family violence victim who is [~~person~~] less than 18 years old eligible to receive 24-hour-a-day shelter?

(a) The center can only provide 24-hour-a-day shelter to a person less than 18 years old if:

(1) that person is:

(A) accompanied by a parent or legal guardian;

(B) legally emancipated;

[~~(C) a minor mother; or~~]

(C) [~~(D)~~] married or has been married; or

(D) experiencing an emergency that constitutes an immediate danger to the physical health or safety of the minor or the minor's child or children; or

(2) the shelter center is licensed to provide residential child care.

(b) The center may rely on the minor's written statement containing the grounds on which the minor has the capacity to consent to emergency shelter or care.

§54.605. When is a family violence victim who is less than 18 years old eligible to receive nonresidential services [~~Can a minor receive Texas Department of Human Services (DHS) contracted nonresidential services if the parent is not receiving services~~]?

(a) The center can provide nonresidential services to a person less than 18 years old if: [~~Yes, the center can provide DHS-contracted nonresidential services to a minor when the parent is not receiving services if the minor:~~]

(1) accompanied by a parent or legal guardian;

(2) an emergency situation constitutes an immediate danger to the physical health or safety of the minor or the minor's child or children;

(3) [~~(1)~~] she or he is a victim of family violence who has been: [~~had the disability of minority removed, either through legal emancipation or marriage; or~~]

(A) legally emancipated; or

(B) married or is married; or

(4) [~~(2)~~] the person says she or he resides in the same household with a victim of family violence as defined in the Human Resources Code, Chapter 51, and if the center:

(A) has parental or legal guardian consent to provide the minor with nonresidential services; or

(B) complies with the Texas Family Code, §32.004, if [~~and~~] parental or legal guardian consent is not obtained; and[~~.~~]

(5) the center complies with any other applicable section of the Texas Family Code.

(b) The center may rely on the minor's written statement containing the grounds on which the minor has the capacity to consent to emergency shelter or care.

§54.650. Are there any limitations to providing shelter or care to family violence victims who are less than 18 years old who are not accompanied by a parent or legal guardian, are not legally emancipated, are not married, or have not been married?

Yes, the Texas Family Code states that emergency shelter or care must not be provided after the 15th day after the date the shelter or care has begun, unless:

(1) the facility receives consent from the minor to continue shelter or care, if the minor:

(A) is 16 years old or older; and

(i) resides separately and apart from the minor's parent, managing conservator, or guardian, regardless of the duration of the residence; and

(ii) manages her or his own financial affairs, regardless of the source of income; or

(B) is unmarried and pregnant or the parent of a child; or

(2) the minor has qualified for financial assistance under the Human Resources Code, Chapter 31, and is on the waiting list for housing assistance.

§54.651. Are there any limitations to providing nonresidential services to family violence victims who are less than 18 years old who are not accompanied by a parent or legal guardian, are not legally emancipated, are not married, or have not been married?

Yes, the Texas Family Code states that care must not be provided after the 15th day after the date the care has begun, unless:

(1) the facility receives consent from the minor to continue care, if the minor:

(A) is 16 years old or older; and

(i) resides separately and apart from the minor's parent, managing conservator, or guardian, regardless of the duration of the residence; and

(ii) manages her or his own financial affairs, regardless of the source of income; or

(B) is unmarried and pregnant or the parent of a child; or

(2) the minor has qualified for financial assistance under the Human Resources Code, Chapter 31, and is on the waiting list for housing assistance; or

(3) the minor says she or he resides in the same household with a victim of family violence as defined in the Human Resources Code, Chapter 51, and if the center:

(A) has parental or legal guardian consent to provide the minor with nonresidential services; or

(B) complies with the Texas Family Code, §32.004, if parental or legal guardian consent is not obtained.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304894
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Texas Department of Human Services (DHS) proposes to amend §97.2, concerning definitions; §97.11, concerning application and issuance of initial license; §97.12, concerning issuance and renewal of license; §97.303, concerning standards for possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs; §97.404, concerning standards specific to agencies licensed to provide personal assistance services; §97.601, concerning license denial, suspension or revocation; and §97.602, concerning administrative penalties, in its Licensing Standards for Home and Community Support Services Agencies chapter. The purpose of the amendments is to implement the sections of House Bill (HB) 2292, 78th Legislature, that affect the Health and Safety Code, Chapter 142. HB 2292 no longer requires DHS to license home and community-based services providers that are monitored by the Texas Department of Mental Health and Mental Retardation (TDMHMR). HB 2292 also exempts from DHS licensure employees of entities that act as consumer fiscal agencies under Government Code, §531.051; amends the statutory definitions; prohibits persons from implying or indicating they are licensed to provide personal assistance services when they are not licensed; provides registered nurses (RNs) with greater flexibility relating to RN delegation; and amends the list of dangerous drugs for which an agency can be responsible.

Proposed §97.2 amends the definition of "certified agency" and "personal assistance services" and adds a new definition for "personal care." The amendments to §97.11 and §97.12 remove license application requirements for agencies now exempt from licensure. Amendments to §§97.12, 97.404, 97.601, and 97.602 update references within the chapter. The table outlining Severity Level I Violations in Figure: 40 TAC §97.602(d)(3)(C) and the table outlining Severity Level II Violations in Figure: 40 TAC §97.602(d)(4)(B) update rule citations and correct grammar. The amendment to §97.303 adds pneumococcal polysaccharide vaccine to the list of dangerous drugs that an agency or its employees who are RNs or LVNs may purchase, store, or transport for the purpose of administering to the agency's employees, clients, or client family members. The amendment to §97.404 adds language that prohibits a person not licensed to provide personal assistance services from indicating or implying he is licensed to provide those services; amends the tasks that may be performed under the personal assistance services category, which conforms to the amended definition of personal care; and adds language that allows an RN to determine which health-related tasks require delegation under the personal assistance services category of licensure. An amendment to §97.602 removes language relating to agencies that now are exempt from licensure.

Bobby Halfmann, Chief Financial Officer, has determined that, for the first five-year period the proposed sections are in effect, there are fiscal implications for state government as a result of enforcing or administering the sections. There are no fiscal implications for local governments as a result of enforcing or administering the sections.

The effect on state government for the first five-year period the sections are in effect is an estimated reduction in cost of $26,730 in fiscal year (FY) 2004; $26,730 in FY 2005; $26,730 in FY

2006; $26,730 in FY 2007; and $26,730 in FY 2008. There also is an estimated loss in revenue of $227,500 in FY 2004; $227,500 in FY 2005; $227,500 in FY 2006; $227,500 in FY 2007; and $227,500 in FY 2008.

Bettye M. Mitchell, Deputy Commissioner for Long Term Care, has determined that, for each year of the first five years the sections are in effect, the public benefits anticipated as a result of enforcing the sections are: (1) providing clarity that only a provider with an HCSSA license from DHS may provide personal assistance services; (2) removing licensing requirements for home and community-based services providers that are monitored by TDMHMR, which reduces the duplication of authority over HCSSAs; (3) allowing RNs to determine which health-related personal assistance services tasks require delegation, which will give RNs greater flexibility; (4) allowing agency RNs and LVNs to purchase, store, or transport pneumococcal polysaccharide vaccines, which will give employees, clients, and client family members greater access to the vaccine; and (5) removing language regarding administrative penalty assessments against agencies now exempt from licensure, which deletes extraneous language. There may be an adverse economic effect on businesses of any size, whether large, small, or micro, if the businesses are providing personal assistance services, as those services are defined in Health and Safety Code, §242.001, without a license. Unlicensed personal assistance services providers will be required to become licensed and pay an $875 license fee annually. If these providers continue to operate without a license, they will be liable for a civil penalty of not less than $1,000 or more than $2,500 for each day of violation. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Linda Kotek at (512) 438- 3158 in DHS's Long Term Care-Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-246, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Government Code, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.2

The amendment is proposed under the Health and Safety Code, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements the Health and Safety Code, §§142.001 - 142.030.

§97.2. Definitions.

The following words and terms, when used in these sections, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) - (17) (No change.)

(18) Certified agency--A home and community support services agency, or portion of the agency, that:

(A) - (B) (No change.)

(19) - (34) (No change.)

(35) Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) - (E) (No change.)

(F) service provided by unlicensed personnel under the delegation or supervision of a licensed health professional;

(G) - (H) (No change.)

(36) - (54) (No change.)

(55) Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes:

(A) personal care;

(B) health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Board of Nurse Examiners through a memorandum of understanding with DHS in accordance with Health and Safety Code, §142.016; [~~,~~] and

(C) health-related tasks provided by unlicensed personnel under the delegation of a registered nurse or that a registered nurse determines do not require delegation.

(56) Personal care--The provision of one or more of the following services required by an individual in a residence or independent living environment:

(A) bathing;

(B) dressing;

(C) grooming;

(D) feeding;

(E) exercising;

(F) toileting;

(G) positioning;

(H) assisting with self-administered medications;

(I) routine hair and skin care; and

(J) transfer or ambulation.

(57) [~~(56)~~] Physical therapist--A person who is currently licensed under Occupations Code, Chapter 453, as a physical therapist.

(58) [~~(57)~~] Physician--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed and practicing medicine under the laws of the state of Texas, Oklahoma, New Mexico, Arkansas, or Louisiana.

(59) [~~(58)~~] Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Occupations Code, Chapter 204, as a physician assistant.

(60) [~~(59)~~] Physician-delegated tasks--Tasks performed in accordance with the Medical Practice Act, Occupations Code, Chapter 157, including orders signed by a physician that [~~which~~] specify the delegated task(s), the individual to whom the task(s) is delegated, and the client's name.

(61) [~~(60)~~] Place of business--An office of a home and community support services agency that maintains client records or

directs home health, hospice, or personal assistance services. The term does not include an administrative support site.

(62) [~~(61)~~] Plan of care--The written orders of a practitioner for a client who requires skilled services.

(63) [~~(62)~~] Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Board of Nurse Examiners for the State of Texas as an advanced practice nurse.

(64) [~~(63)~~] Presurvey conference--A conference held with DHS staff and the applicant or his or her representatives to review licensure standards and survey documents, and to provide consultation before [~~prior to~~] the on-site licensure survey.

(65) [~~(64)~~] Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(66) [~~(65)~~] Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(67) [~~(66)~~] Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Occupations Code, Chapter 301, as a registered nurse.

(68) [~~(67)~~] Registered nurse delegation--Delegation by a registered nurse in accordance with:

(A) 22 TAC, Chapter 224 (concerning Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(B) 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(69) [~~(68)~~] Residence--A place where a person resides and includes a home, a nursing facility, a convalescent home, or a residential unit.

(70) [~~(69)~~] Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Health and Safety Code, Chapter 142.

(71) [~~(70)~~] Respiratory therapist--A person who is currently licensed under Occupations Code, Chapter 604, as a respiratory care practitioner.

(72) [~~(71)~~] Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(73) [~~(72)~~] Section--A reference to a specific rule in [~~Chapter 97 of~~] this chapter [~~title (concerning Licensing Standards for Home and Community Support Services Agencies)~~].

(74) [~~(73)~~] Service area--The geographic area(s) established by an agency in which all or some of the agency's services are available.

(75) [~~(74)~~] Skilled services--Services in accordance with a plan of care that require the skills of a:

(A) registered nurse;

(B) licensed vocational nurse;

(C) physical therapist;

(D) occupational therapist;

(E) respiratory therapist;

(F) speech-language pathologist;

(G) audiologist;

(H) social worker; or

(I) dietitian.

(76) [~~(75)~~] Social worker--A person who is currently licensed as a social worker under Occupations Code, Chapter 505.

(77) [~~(76)~~] Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Occupations Code, Chapter 401.

(78) [~~(77)~~] Statute--The Health and Safety Code, Chapter 142.

(79) [~~(78)~~] Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(b) of this chapter [~~title~~] (relating to Staffing Qualifications and Conditions). This person may also be known as the director of nursing or similar title.

(80) [~~(79)~~] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(81) [~~(80)~~] Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(82) [~~(81)~~] Survey--An inspection or investigation conducted by a DHS representative to determine if a licensee is in compliance with the statute and this chapter.

(83) [~~(82)~~] Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(84) [~~(83)~~] Unlicensed person--An individual who is not licensed as a health care professional. The term includes, but is not limited to, home health aides, medication aides permitted by DHS, and other individuals providing personal care or assistance in health services.

(85) [~~(84)~~] Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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SUBCHAPTER B. APPLICATION AND ISSUANCE OF A LICENSE

40 TAC §97.11, §97.12

The amendments are proposed under the Health and Safety Code, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendments implement the Health and Safety Code, §§142.001 - 142.030.

§97.11. Application and Issuance of Initial License.

(a) - (f) (No change.)

(g) The applicant must apply for a license in accordance with this subsection.

(1) - (2) (No change.)

(3) The following items must accompany the application form and must be originals or notarized copies:

(A) - (P) (No change.)

[~~(Q) if certified by another state agency to deliver services for which a license is required under this chapter, documentation from the certifying state agency(ies) confirming the certification;~~]

(Q) [~~(R)~~] the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) denial, suspension, or revocation of an agency license or a license for any health care facility in any state or any other enforcement action, such as court, civil, or criminal action;

(ii) denial, suspension, or revocation of or other enforcement action against an agency license or a license for any health care facility in any state that [~~which~~] is or was proposed by the licensing agency and the status of the proposal;

(iii) surrendering a license before expiration of the license or allowing a license to expire in lieu of DHS [~~the department~~] proceeding with enforcement action;

(iv) federal or state Medicaid or Medicare sanctions or penalties relating to the operation of an agency or health care facility;

(v) federal or state (any state) criminal felony convictions;

(vi) operation of an agency that has been decertified in any state under Medicare or Medicaid; or

(vii) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid;

(R) [~~(S)~~] for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) federal or state (any state) criminal misdemeanor convictions;

(ii) federal or state (any state) tax liens;

(iii) unsatisfied final judgements;

(iv) eviction involving any property or space used as an agency in any state;

(v) unresolved final state or federal Medicare or Medicaid audit exceptions; or

(vi) injunctive orders from any court; [~~and~~]

(S) [~~(T)~~] notice that the agency has attended a presurvey conference at the office designated by DHS, or that the designated survey office has waived the presurvey conference.

(i) It is the agency's responsibility to contact the designated survey office to schedule a presurvey conference.

(ii) The administrator and supervising nurse (if applicable) must attend the presurvey conference.

(iii) The designated survey office must verify compliance with the applicable provisions of this chapter and recommend that the agency be issued an initial license or that the application be denied pursuant to §97.601 of this chapter [~~title~~] (relating to License Denial, Suspension, or Revocation); [~~and~~]

(T) [~~(U)~~] information relating to compliance by the applicant or a controlling person with respect to the applicant with regulatory requirements in any other state in which the applicant or controlling person operates or operated a home and community support services agency; and[~~.~~]

(U) [~~(V)~~] any other document or information that DHS requests that is relevant to the application process.

(4) - (6) (No change.)

(h) - (n) (No change.)

§97.12. Issuance and Renewal of License.

(a) (No change.)

(b) Renewal application.

(1) (No change.)

(2) The agency must submit to DHS postmarked at least 30 days before [~~prior to~~] the expiration date of the license:

(A) a complete and correct application renewal form that [~~which~~] includes updated information as required by §97.11(g)(3)(C)-(J)[~~.~~], §97.11(g)(3)(K)(iii)-(vi), and §97.11(g)(3)(Q) and (R) [~~§97.11(g)(3)(R) and (S)~~] of this chapter [~~title~~];

(B) - (E) (No change.)

[~~(F) if certified by or contracting with another state agency to deliver services for which a license is required under this chapter, documentation from the certifying state agency(ies) confirming the certification or contract;~~]

(F) [~~(G)~~] if an applicant is a corporation, a current letter from the state comptroller's office stating the corporation is in good standing or a notarized certification that the tax owed to the state under the Tax Code, Chapter 171, is not delinquent or that the corporation is exempt from the payment of the tax and is not subject to the Tax Code, Chapter 171; [~~and~~]

(G) [~~(H)~~] information relating to compliance by the license holder or a controlling person with respect to the license holder with regulatory requirements in any other state in which the license holder or controlling person operates or operated a home and community support services agency; and[~~.~~]

(H) [~~(I)~~] any other document or information that DHS requests that is relevant to the application process.

(3) (No change.)

(c) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel, Legal Services
Texas Department of Human Services
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SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES
DIVISION 4. PROVISION AND COORDINATION OF TREATMENT AND SERVICES

40 TAC §97.303

The amendment is proposed under the Health and Safety Code, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements the Health and Safety Code, §§142.001 - 142.030.

§97.303. Standards for Possession of Sterile Water or Saline, Certain Vaccines or Tuberculin, and Certain Dangerous Drugs.

An agency that [~~, which~~] possesses sterile water or saline, certain vaccines or tuberculin, or certain dangerous drugs as specified by this section[~~,~~] must comply with the provisions of this section.

(1) (No change.)

(2) Possession of certain vaccines or tuberculin.

(A) An agency or its employees who are registered nurses or licensed vocational nurses may purchase, store, or transport for the purpose of administering to the agency's employees, home health[~~,~~] or hospice clients, or client family members under physician's standing orders the following dangerous drugs:

(i) (No change.)

(ii) influenza vaccine; [~~and~~]

(iii) tuberculin purified protein derivative for tuberculosis testing; and[~~,~~]

(iv) pneumococcal polysaccharide vaccine.

(B) (No change.)

(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel, Legal Services
Texas Department of Human Services
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SUBCHAPTER D. ADDITIONAL STANDARDS SPECIFIC TO LICENSE CATEGORY AND SPECIFIC TO SPECIAL SERVICES

40 TAC §97.404

The amendment is proposed under the Health and Safety Code, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements the Health and Safety Code, §§142.001-142.030.

§97.404. Standards Specific to Agencies Licensed to Provide Personal Assistance Services.

(a) (No change.)

(b) A person who is not licensed to provide personal assistance services under this chapter may not indicate or imply that the person is licensed to provide personal assistance services by the use of the words "personal assistance services" or in any other manner.

(c) [~~(b)~~] Personal assistance services as defined in §97.2 of this chapter [~~title~~] (relating to Definitions) may be performed by an unlicensed person who is at least 18 years of age and has demonstrated competency, when competency cannot be determined through education and experience, to perform the tasks assigned by the supervisor. An unlicensed person who is under 18 years of age, is a high school graduate or is enrolled in a vocational educational program, and has demonstrated competency to perform the tasks assigned by the supervisor, may perform personal assistance services.

(d) [~~(c)~~] The following tasks may be performed under a personal assistance services category:

(1) personal care as defined in §97.2 of this chapter [~~including feeding, preparing meals, transferring, toileting, ambulation and exercise, grooming, bathing, dressing, routine care of hair and skin, and assistance with medications that are normally self administered~~];

(2) health-related tasks provided by unlicensed personnel that may be delegated by an RN or that an RN determines do not require delegation in accordance with the agency's written policy adopted, implemented, and enforced to ensure compliance with the rules adopted by the Board of Nurse Examiners (BNE) for the State of Texas in 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions);

(3) health-related tasks that are not the practice of professional nursing under the memorandum of understanding between the Texas Department of Human Services (DHS) and the BNE; and

(4) health-related tasks that are delegated by a physician under the Occupations Code, Chapter 157.

(e) [~~(d)~~] The agency must ensure that when developing its operational policies, [~~that~~] the policies are considerate of principles of

individual and family choice and control, functional need, and accessible and flexible services.

(f) [~~(e)~~] In addition to the client record requirements in §97.301(a)(9) of this chapter [~~title~~] (relating to Client Records), the client file must include the following:

(1) documentation of determination of services based on an on-site visit by the supervisor where services will be primarily delivered and records of supervisory visits, if applicable;

(2) individualized service plan developed, agreed upon, and signed by the client or family and the agency. The individualized service plan must include, but not be limited to the following:

(A) types of services, supplies, and equipment to be provided;

(B) locations of services;

(C) frequency and duration of services;

(D) planned date of service initiation;

(E) charges for services rendered if the charges will be paid in full or in part by the client or significant other(s), or on request; and

(F) plan of supervision; and

(3) documentation that the services have been provided according to the individualized service plan.[~~;~~]

(g) [~~(f)~~] In addition to the written policies required by §97.245 of this chapter (relating to Staffing Policies) the agency must adopt and enforce a written policy addressing the supervision of personnel with input from the client or family on the frequency of supervision.

(1) Supervision of personnel must be in accordance with the agency's policies and applicable state laws and rules, including rules adopted by the BNE in 22 TAC, Chapter 225.

(2) A supervisor must be a licensed nurse or have completed two years of full-time study at an accredited college or university. An individual with a high school diploma or general equivalence diploma (GED) may substitute one year of full-time employment in a supervisory capacity in a health care facility, agency, or community-based agency for each required year of college.

(3) The client in a client managed attendant care program funded by DHS or Texas Rehabilitation Commission is not required to meet the standard in paragraph (2) of this subsection.

(h) [~~(g)~~] Tube feedings and medication administration through a permanently placed gastrostomy tube (g-tube) in accordance with subsection (d)(3) [~~(c)(3)~~] of this section may be performed by an unlicensed person only after successful completion of the training and competency program and procedures described in paragraphs (1) - (5) of this subsection.

(1) The training and competency program for the performance of g-tube feedings by an unlicensed person must be taught by an RN, physician, physician assistant (PA), or qualified trainer. A qualified trainer must:

(A) have successfully completed the training and competency program described in paragraphs (2) and (3) of this subsection taught by an RN, physician, or PA;

(B) have demonstrated upon return demonstration to an RN, physician, or PA the performance of the task and the ability to teach the task; and

(C) have been deemed competent by an RN, physician, or PA to train unlicensed personnel in these procedures. Documentation of competency to perform, train, and teach must be maintained in the employee's or contractor's file. Competency must be evaluated and documented by an RN, physician, or PA annually.

(2) The minimum training program must include:

(A) a description of the g-tube placement, including its purpose;

(B) infection control procedures and universal precautions to be utilized when performing g-tube feedings or medication administration through a g-tube;

(C) a description of conditions that [~~which~~] must be reported to the client or the primary caregiver, or in the absence of the primary caregiver, to the agency administrator, supervisor, or the client's physician. The description of conditions must include a plan to be effected if the g-tube comes out or is not positioned correctly to ensure medical attention is provided within one hour;

(D) review of a written procedure for g-tube feeding or medication administration through a g- tube. The written procedure must be equivalent to current acceptable nursing standards of practice, including addressing the crushing of medications;

(E) conditions under which g-tube feeding or medication administration must not be performed; and

(F) demonstration of a g-tube feeding and medication administration to a client. If the trainee will become a qualified trainer, the demonstration must be done by the RN, PA, or physician. If the trainee will not become a qualified trainer, the demonstration may be done by an RN, PA, physician, or qualified trainer.

(3) The minimum competency evaluation must be documented and maintained in the employee's file and must include:

(A) a score of 100% on a written multiple choice test that consists of situational questions to include the criteria in paragraph (2)(A) - (E) of this subsection and an evaluation of [~~evaluate~~] the trainee's judgment and understanding of the essential skills, risks, and possible complications of a g-tube feeding or medication administration through a g-tube;

(B) a skills checklist demonstrating that the trainee has successfully completed the necessary skills for a g-tube feeding and medication administration via g-tube, and if the trainee will become a qualified trainer, the skills checklist must also demonstrate the ability to teach another person to perform the task. The skills checklist must be completed by an RN, physician, or PA if the trainee will become a qualified trainer. The skills checklist for a trainee who will not become a qualified trainer may be completed by an RN, physician, PA, or qualified trainer; and

(C) documentation of an accurate demonstration of the g-tube feeding and medication administration performed by the trainee as required by paragraph (2)(F) of this subsection. If the trainee will become a qualified trainer, documentation of competency to teach this task must be maintained in the file of the qualified trainer. The person responsible for the training of the trainee must document the successful demonstration of the g-tube feeding and medication administration via g-tube by the trainee and the trainee's competency to perform this task in the trainee's file.

(4) The client or primary caregiver must provide information on the client's g-tube feeding or medication administration to the agency supervisor. If the client is not capable of directing his or her own

care, the client's primary caregiver must be present to instruct and orient the supervisor regarding the client's g-tube feeding and medication regime. A copy of the current regime including unique conditions specific to the client must be placed in the client's file by the agency supervisor and provided to the respite caregiver. The respite caregiver must be oriented by the client, the client's primary caregiver, or the agency supervisor. The supervisor of the delivery of these services must have successfully completed a training and competency program outlined in paragraphs (2) and (3) of this subsection or be a qualified trainer.

(5) Legend medications that are to be administered must be in a legally labeled container from a pharmacy that contains the name of the client. Instructions for dosages according to weight or age for over-the-counter drugs commonly given the client must be furnished by the primary caregiver to the respite caregiver performing the tube feeding or medication administration.

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SUBCHAPTER F. ENFORCEMENT

40 TAC §97.601, §97.602

The amendments are proposed under the Health and Safety Code, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendments implement the Health and Safety Code, §§142.001-142.030.

§97.601. License Denial, Suspension, or Revocation.

(a) The Texas Department of Human Services (DHS) may deny, suspend, suspend on an emergency basis, or revoke a license issued to an applicant or agency if the applicant or agency:

(1) - (7) (No change.)

(8) discloses action as described in §97.11(g)(3)(Q) and (R) [~~§97.11(g)(3)(R) and (S)~~] of this chapter [~~title~~] (relating to Application and Issuance of Initial License) or §97.12(b)(2)(A) of this chapter [~~title~~] (relating to Issuance and Renewal of License);

(9) (No change.)

(b) - (j) (No change.)

§97.602. Administrative Penalties.

(a) (No change.)

(b) Assessment of a penalty.

~~[(1) Notwithstanding any other provision of the statute, DHS may not assess an administrative penalty against an agency:]~~

~~[(A) that provides only long-term care Medicaid waiver services that are publicly funded and is certified and monitored by a state agency that has developed standards that ensure the health and safety of service recipients; or]~~

~~[(B) that provides home health, hospice, or personal assistance services only to persons enrolled in a program that is funded in whole or in part by the Texas Department of Mental Health and Mental Retardation (TDMHMR) and is monitored by the TDMHMR or its designated local authority in accordance with standards set by the TDMHMR.]~~

(1) [~~(2)~~] The assessment of an administrative penalty will be in accordance with the schedule of appropriate and graduated penalties described in subsection (d) of this section. The schedule of appropriate and graduated penalties for each violation is based on the following criteria:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation, and the hazard of the violation to the health or safety of clients;

(B) the history of previous violations by a person or a controlling person with respect to that person;

(C) whether the affected home and community support services agency had identified the violation as part of its internal quality assurance process and had made appropriate progress on correction. For purposes of this subparagraph, appropriate progress is defined as making a good faith, substantial effort to correct the violation in a timely manner;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other [~~others~~] matters that justice may require.

(2) [~~(3)~~] In determining which violation(s) warrants a penalty(ies), DHS will consider:

(A) the seriousness of the violation(s), including the nature, circumstances, extent, and gravity of the violation(s), and the hazard of the violation(s) to the health or safety of a client; and

(B) whether the affected agency had identified the violation(s) as part of its internal quality assurance process and had made appropriate progress on correction.

(3) [~~(4)~~] An administrative penalty for a subsequent occurrence may only be assessed when the subsequent occurrence occurs within three years from the date the agency first receives oral or written notice of the first violation.

(4) [~~(5)~~] The assessment of an administrative penalty does not preclude DHS from suspending, revoking, or denying a license in accordance with §97.601 of this chapter [~~title~~] (relating to License Denial, Suspension, or Revocation).

(c) (No change.)

(d) Schedule of penalties.

(1) - (2) (No change.)

(3) Severity level I. A severity level I violation is a violation that has or has had minor or no client health or safety significance.

(A) - (B) (No change.)

(C) A violation of each of the rules listed in the following table may warrant a severity level I administrative penalty.
Figure: 40 TAC §97.602(d)(3)(C)

(4) Severity level II.

(A) (No change.)

(B) DHS may assess a separate level II administrative penalty for a violation of each of the rules listed in the following table.

Figure: 40 TAC §97.602(d)(4)(B)

(e) (No change.)

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE AND DEVELOPMENT

SUBCHAPTER G. CHILD CARE FOR PEOPLE TRANSITIONING OFF PUBLIC ASSISTANCE

The Texas Workforce Commission (Commission) proposes the repeal of and new rules for Chapter 809, Child Care and Development, Subchapter G, Child Care for People Transitioning Off Public Assistance, §809.102 relating to Choices Child Care.

Purpose. The purpose of these rules is to implement House Bill 2292 enacted by the 78th Legislature, Regular Session, 2003, (HB 2292), which amends, in pertinent parts, Chapter 31, Texas Human Resources Code to incorporate the pay for performance model relating to Temporary Assistance for Needy Families (TANF) cash assistance and Medicaid assistance for the adult(s).

Background: Consistent with federal statutory authority, Chapter 31, Human Resources Code requires that individuals must engage in work activities in order to receive TANF cash assistance and Medicaid assistance for the adult(s) unless exempt from the work activities. The Commission is responsible for the employment and training requirements contained in Chapter 31 through the local workforce development boards (Boards) under Section 302.021(a)(5), Labor Code.

Testimony and legislative debate on HB 2292 centered in part on reinforcing the personal responsibility requirements relating to TANF cash assistance and Medicaid assistance for the adult(s) and to ensure that no state or federal funds are used to pay for assistance to individuals that fail to cooperate. This ensures that families are cooperating in order to receive their cash assistance and supports the principle that the state should not support families who consistently refuse to cooperate.

HB 2292 also strengthened the linkages among the human services agencies by consolidating the twelve existing agencies within five agencies. The Health and Human Services Commission (HHSC), one of the five agencies, will oversee the operations of the remaining four agencies as well as the development of policies and rules. An oversight role of HHSC is to ensure that human services agencies are linking with the Commission to ensure that work opportunities for individuals are maximized and to ensure that individuals are cooperating with their mandatory work requirements. Such linkage ensures that opportunities are maximized to assist recipients obtaining and retaining employment through engaging in work activities where applicable.

The Commission has determined, consistent with the authority granted to states under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), that the definition of work activities includes cooperation with the Responsibility Agreement and the family employment plan. The specific statutory authority rests in 45 USCA Section 607 and is further clarified in the federal regulations interpreting those requirements, which state in part the following: 45 CFR Sections 261.10, relating to what work requirements must an individual meet, 64 Fed. Reg. 17767, (April 12, 1999) states that "the State defines the work activities that meet the [work] requirement." Likewise, the preamble at the same page also states that "[as] stated above, it is the State's prerogative and responsibility to define the activities it considers to meet these requirements...." Specifically, 45 CFR Section 261.12 (b) states that the individual responsibility plan "...should describe the obligations of the individual. These could include going to school, maintaining certain grades, keeping school-aged children in school, immunizing children, going to classes, or doing other things that will help the individual become or remain employed in the private sector." Based on this language and the principle of personal responsibility, the Commission has added a definition of "work activity" to clearly communicate the inclusion of the requirements specified in the Responsibility Agreement.

The current Responsibility Agreement used by the State of Texas requires the following:

*Participation in mandatory work activities;

*Cooperation with child support enforcement efforts to establish paternity and obtain child support;

*Remaining employed and not quitting a job without good cause;

*Maintenance of children's health and dental checkups;

*Maintenance of children's immunizations;

*School attendance, as required;

*Attendance at parenting skills training, when required;

*Abstention from using, possessing, or selling controlled substances;

*Abstention from alcohol abuse; and,

*Truthful representation of the recipient's situation.

Under the pay for performance model, the Legislature requires that a TANF family that does not cooperate with their required work activities will be sanctioned, resulting in the termination of the total amount of TANF cash assistance provided to the family. In addition, the Medicaid assistance for the adult(s) will be denied, unless the adult is under 19 years of age or pregnant.

The sanction period will last a minimum of one month, or until cooperation is demonstrated. If the sanction results from noncooperation with Choices, one month of demonstrated cooperation is required to reinstate receipt of the family's TANF cash assistance.

The Texas Department of Human Services (TDHS) will not reinstate the family's TANF cash assistance until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements are met. Furthermore, if a TANF recipient fails to cooperate for two consecutive months, the family's TANF case will be closed, and the family will be required to reapply for TANF cash assistance. Before certification, the conditional applicant will be required to attend a Workforce Orientation for Applicants (WOA) and to demonstrate one month of cooperation with Choices service requirements. TDHS will not process the family's TANF application until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements were met.

The Commission's intent is to ensure that failure to cooperate is not a result of circumstances that would have prevented Choices participation. Therefore, the Commission will continue to stress the importance of contacting individuals to determine whether a good cause reason for nonparticipation exists.

During the one-month period of demonstrated cooperation, support services will be available as needed. For that reason and consistent with new §31.0032, Human Resources Code as amended by HB 2292, §809.102 relating to Choices Child Care is changed to include that children of sanctioned families and conditional applicants that must demonstrate cooperation prior to the reinstatement of their TANF cash assistance are eligible to receive Choices Child Care.

These changes further align the receipt of cash assistance with employment, similar to the world of work, because employers pay their employees only after working for a specific period of time.

Although the rules are repealed in full and adopted as new, many of the provisions of the current rules are retained. For a copy of a comparison document of the existing rules with the emergency rules, please see the Commission web page at http://www.twc.state.tx.us/twcinfo/rules/prorules.html. To provide clarity to the rules, throughout the rules, technical modifications are made to update references to "recipients." This is done in conjunction with changes to the Choices definitions to clarify that sanctioned families and conditional applicants are considered mandatory individuals. Following is a more detailed explanation of the rule changes.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules;

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules;

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules;

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules; and

There are no anticipated economic costs to persons required to comply with the rules.

Mr. Townsend has also determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering the rules because small businesses are not regulated or required to do anything by the rules.

James Barnes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in this state as a result of the proposed rules.

Luis Macias, Director of Workforce Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to provide activities and support services in a more flexible manner to meet the needs of persons receiving TANF and demonstrating cooperation as a condition of the reinstatement of TANF, to become self-sufficient and independent of public assistance and to provide employers with a skilled workforce.

Comments on the proposed section may be submitted to John Moore, General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax 512-463-2220; or e-mailed to john.moore@twc.state.tx.us. Comments must be received by the Commission no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

For information about the Commission please visit our web page at www.twc.state.tx.us.

40 TAC §809.102

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§809.102. Choices Child Care.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

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John Moore
General Counsel
Texas Workforce Commission
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For further information, please call: (512) 463-2573

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40 TAC §809.102

The new rule is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rule affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§809.102. Choices Child Care.

(a) Children eligible to receive Choices child care include;

(1) children of TANF recipients participating in the Choices program as stipulated in Chapter 811 of this title; and

(2) children of sanctioned families and conditional applicants, as defined in Chapter 811 of this title, who must demonstrate cooperation prior to the resumption of TANF cash assistance as stipulated in Chapter 811 of this title.

(b) Child care shall be provided to children of parents participating in the Choices program as stipulated in Chapter 811 of this title, who need child care to accept employment and remain employed.

(c) Persons approved for Choices but waiting to enter an approved initial component of the program may receive up to two weeks of child care:

(1) when child care will prevent loss of the Choices placement, and

(2) if child care is available to meet the needs of the child and parent.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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John Moore
General Counsel
Texas Workforce Commission
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For further information, please call: (512) 463-1426

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CHAPTER 811. CHOICES

The Texas Workforce Commission (Commission) proposes the repeal of Chapter 811, Choices, Subchapter A, General Provisions, §§811.1-811.3, Subchapter B, Access to Choices Services, §§811.11-811.14, Subchapter C, Choices Services, §§811.21-811.30, Subchapter D, Choices Work Activities, §§811.41-811.52, Subchapter E, Support Services and Other Initiatives, §§811.61-811.67, and Subchapter F, Appeals, §§811.71-811.73, and new rules for Chapter 811, Choices, Subchapter A, General Provisions, §§811.1-811.3, Subchapter B, Choices Services Responsibilities, §§811.11-811.16, Subchapter C, Choices Services, §§811.21-811.32, Subchapter D, Choices Work Activities, §§811.41-811.52, Subchapter E, Support Services and Other Initiatives, §§811.61-811.67, and Subchapter F, Appeals, §§811.71-811.73.

Purpose. The purpose of these rules is to implement House Bill 2292 enacted by the 78th Legislature, Regular Session, 2003, (HB 2292), which amends, in pertinent parts, Chapter 31, Texas Human Resources Code to incorporate the pay for performance model relating to Temporary Assistance for Needy Families (TANF) cash assistance and Medicaid assistance for the adult(s).

Background: Consistent with federal statutory authority, Chapter 31, Human Resources Code requires that individuals must engage in work activities in order to receive TANF cash assistance and Medicaid assistance for the adult(s) unless exempt from the work activities. The Commission is responsible for the employment and training requirements contained in Chapter 31 through the local workforce development boards (Boards) under Section 302.021(a)(5), Labor Code.

Testimony and legislative debate on HB 2292 centered in part on reinforcing the personal responsibility requirements relating to TANF cash assistance and Medicaid assistance for the adult(s) and to ensure that no state or federal funds are used to pay for assistance to individuals that fail to cooperate. This ensures that families are cooperating in order to receive their cash assistance and supports the principle that the state should not support families who consistently refuse to cooperate.

HB 2292 also strengthened the linkages among the human services agencies by consolidating the twelve existing agencies within five agencies. The Health and Human Services Commission (HHSC), one of the five agencies, will oversee the operations of the remaining four agencies as well as the development of policies and rules. An oversight role of HHSC is to ensure that human services agencies are linking with the Commission to ensure that work opportunities for individuals are maximized and to ensure that individuals are cooperating with their mandatory work requirements. Such linkage ensures that opportunities are maximized to assist recipients obtaining and retaining employment through engaging in work activities where applicable.

The Commission has determined, consistent with the authority granted to states under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), that the definition of work activities includes cooperation with the Responsibility Agreement and the family employment plan. The specific statutory authority rests in 45 USCA Section 607 and is further clarified in the federal regulations interpreting those requirements, which state in part the following: 45 CFR Sections 261.10, relating to what work requirements must an individual meet, 64 Fed. Reg. 17767, (April 12, 1999) states that "the State defines the work activities that meet the [work] requirement." Likewise, the preamble at the same page also states that "[as] stated above, it is the State's prerogative and responsibility to define the activities it considers to meet these requirements...." Specifically, 45 CFR Section 261.12 (b) states that the individual responsibility plan "...should describe the obligations of the individual. These could include going to school, maintaining certain grades, keeping school-aged children in school, immunizing children, going to classes, or doing other things that will help the individual become or remain employed in the private sector." Based on this language and the principle of personal responsibility, the Commission has added a definition of "work activity" to clearly communicate the inclusion of the requirements specified in the Responsibility Agreement.

The current Responsibility Agreement used by the State of Texas requires the following:

*Participation in mandatory work activities;

*Cooperation with child support enforcement efforts to establish paternity and obtain child support;

*Remaining employed and not quitting a job without good cause;

*Maintenance of children's health and dental checkups;

*Maintenance of children's immunizations;

*School attendance, as required;

*Attendance at parenting skills training, when required;

*Abstention from using, possessing, or selling controlled substances;

*Abstention from alcohol abuse; and,

*Truthful representation of the recipient's situation.

Under the pay for performance model, the Legislature requires that a TANF family that does not cooperate with their required work activities will be sanctioned, resulting in the termination of the total amount of TANF cash assistance provided to the family. In addition, the Medicaid assistance for the adult(s) will be denied, unless the adult is under 19 years of age or pregnant.

The sanction period will last a minimum of one month, or until cooperation is demonstrated. If the sanction results from noncooperation with Choices, one month of demonstrated cooperation is required to reinstate receipt of the family's TANF cash assistance.

The Texas Department of Human Services (TDHS) will not reinstate the family's TANF cash assistance until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements are met. Furthermore, if a TANF recipient fails to cooperate for two consecutive months, the family's TANF case will be closed, and the family will be required to reapply for TANF cash assistance. Before certification, the conditional applicant will be required to attend a Workforce Orientation for Applicants (WOA) and to demonstrate one month of cooperation with Choices service requirements. TDHS will not process the family's TANF application until the Texas Workforce Center sends a notification to the local TDHS office indicating that the Choices service requirements were met.

The Commission's intent is to ensure that failure to cooperate is not a result of circumstances that would have prevented Choices participation. Therefore, the Commission will continue to stress the importance of contacting individuals to determine whether a good cause reason for nonparticipation exists.

During the one-month period of demonstrated cooperation, support services will be available as needed. For that reason and consistent with new §31.0032, Human Resources Code as amended by HB 2292, §809.102 relating to Choices Child Care is changed to include that children of sanctioned families and conditional applicants that must demonstrate cooperation prior to the reinstatement of their TANF cash assistance are eligible to receive Choices Child Care.

These changes further align the receipt of cash assistance with employment, similar to the world of work, because employers pay their employees only after working for a specific period of time.

Although the rules are repealed in full and adopted as new, many of the provisions of the current rules are retained. For a copy of a comparison document of the existing rules with the emergency rules, please see the Commission web page at http://www.twc.state.tx.us/twcinfo/rules/prorules.html. To provide clarity to the rules, throughout the rules, technical modifications are made to update references to "recipients." This is done in conjunction with changes to the Choices definitions to clarify that sanctioned families and conditional applicants are considered mandatory individuals. Following is a more detailed explanation of the rule changes.

Section 811.2 sets forth the definitions relating to Choices services. The following terms are added: "conditional applicant," "mandatory individual," "mandatory recipient," and "sanctioned family." The terms individual, applicant, recipient, and former recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

The Commission clarifies that a sanctioned family who must demonstrate one month of cooperation in the program month following the family's initial Choices noncooperation may or may not be receiving TANF cash assistance. Due to the TDHS automation schedule, penalties that are received after the TDHS "cut-off" date will not be effective in the following month. For example, in September, the TDHS cut-off date is September 17. If a recipient noncooperates in September and Workforce Center staff submit a penalty request on September 17, the effective date of the full-family sanction will be in November. However, the recipient must demonstrate cooperation throughout the month of October, which is the first program month after the month of noncooperation. During the month of October, the sanctioned family will still be receiving TANF cash assistance, and is considered mandatory; therefore, the sanctioned family will be in the Board's denominator for this month.

The term "work activity" is also added. Because of the fundamental barriers addressed in the Responsibility Agreement, the Commission has determined that inherent to the definition of work are the concepts included in the Responsibility Agreement which support a recipient's continued job readiness. Without cooperation with the Responsibility Agreement, the individual would be hindered in his or her ability to work or retain employment.

Section 811.3 sets forth Choices Service Strategies. The terms applicant, recipient, and former recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.11 sets forth Board Responsibilities. The terms applicant and recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations. The rules also require conditional applicants, who must demonstrate one month of cooperation with Choices and attend a WOA, to be enrolled immediately in Choices services. This section requires Boards to develop collaborative partnerships with housing authorities and sponsors of local housing programs to address unmet housing needs of Choices individuals. Finally, this section requires that Boards establish a referral program for individuals with higher than average barriers to employment, so they may receive services to address such barriers.

Section 811.12 sets forth Applicant Responsibilities. The term applicant was reviewed for appropriateness and modified, if necessary, to describe the applicable populations. The rule clarifies that conditional applicants must attend a WOA.

Section 811.13 sets forth Responsibilities of Mandatory Individuals. The terms individual and recipient were reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.14 sets forth issues regarding Noncooperation. The provisions contain the same language set forth in §811.11, with the following changes. Timely and reasonable attempts must

be made to contact recipients, sanctioned families, and conditional applicants to determine their reasons for noncooperation. If good cause is not determined, these individuals must be notified of their right to appeal. Additionally, recipients who were not in sanction status must be notified of the required procedures to demonstrate one month of cooperation prior to the reinstatement of their family's TANF cash assistance.

Section 811.15 sets forth issues regarding Demonstrated Cooperation. This section sets forth the requirements for sanctioned families and conditional applicants to demonstrate one month of cooperation prior to reinstating their family's TANF cash assistance.

Section 811.16 sets forth Good Cause for Mandatory Individuals. The term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. Families who must demonstrate one month of cooperation may receive good cause. If good cause is granted, TDHS shall be notified that the family demonstrated cooperation, and the family's TANF cash assistance may be reinstated.

Section 811.21 sets forth General Provisions for Choices services. This section adds language to address the impact of the Fair Labor Standards Act on sanctioned families and conditional applicants who are not receiving TANF cash assistance, and who may be participating in an unpaid work activity. The allowable number of hours in such activities will be based on the household's food stamp allotment divided by the minimum wage.

Section 811.22 sets forth Assessment provisions. The term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. Changes were also made to require that ongoing assessments address any skills needed for job-specific training. It is the Commission's intent that job skills training be provided within the Work First service delivery design and, as appropriate, be provided to assist individuals in obtaining needed skills as identified by employers. This section ensures that assessments identify recipients with higher than average barriers to employment, so those individuals may be referred to community-based organizations, and other entities, to address the barriers.

Section 811.23 sets forth provisions regarding the Family Employment Plan. The term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. In addition, new language is added to incorporate the requirements of the Responsibility Agreement in the Family Employment Plan. Adults in TANF families have the responsibility to ensure the health and welfare of their children. This has a direct impact on their ability to obtain and retain employment.

In §§811.24-811.30 the term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations. Sanctioned families are not subject to the four/six week job search limitation during the month in which they are not receiving TANF cash assistance. The four/six week limitation is only applicable to families who are receiving a TANF cash assistance.

Sections 811.31 and 811.32 set forth Special Provisions regarding Conditional Applicants and Sanctioned Families to require that any job search activities be staff assisted.

Section 811.41 regarding Job Search and Job Readiness Assistance includes a new description of staff-assisted services.

In §§811.45 - 811.50 the term recipient was reviewed for appropriateness and, if necessary, modified to describe the applicable populations.

Section 811.51 regarding Post-Employment Services was reviewed. The terms recipient and former recipient were modified, if necessary, to describe the applicable populations. Language was also added to encourage Boards to utilize mentoring techniques as part of their post-employment service strategies.

Section 811.61 sets forth Support Services issues. The new language clarifies that any support service classified as cash assistance may only be provided for four months or less to an unemployed individual who is not already receiving cash assistance. This section also contains language to clarify that conditional applicants and sanctioned families may receive necessary support services in order to demonstrate one month of cooperation.

Section 811.63(b) was removed because it applies to all support services, which is now located under §811.63.

Under federal regulations, support services designed to meet a basic need, such as transportation, are classified as cash assistance when provided to an unemployed TANF recipient. The federal regulations do provide for an exception if such services are designed to be short term. Therefore, the rules clarify that these support services are classified as a short-term nonrecurrent benefit-that is, they are designed to last for less than four months and, therefore, are exempt from the federal definition of cash assistance.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules;

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules;

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules;

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules; and

There are no anticipated economic costs to persons required to comply with the rules.

Mr. Townsend has also determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering the rules because small businesses are not regulated or required to do anything by the rules.

James Barnes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in this state as a result of the proposed rules.

Luis Macias, Director of Workforce Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to provide activities and support services in a more flexible manner to meet the needs of persons receiving TANF and demonstrating cooperation as a condition of the reinstatement of TANF, to become self-sufficient and independent of public assistance and to provide employers with a skilled workforce.

Comments on the proposed section may be submitted to John Moore, General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax 512-463-2220; or e-mailed to john.moore@twc.state.tx.us. Comments must be received by the Commission no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

For information about the Commission please visit our web page at www.twc.state.tx.us.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§811.1 - 811.3

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§811.1. Purpose and Goal.
§811.2. Definitions.
§811.3. Choices Service Strategy.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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John Moore
General Counsel
Texas Workforce Commission
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SUBCHAPTER B. ACCESS TO CHOICES SERVICES

40 TAC §§811.11 - 811.14

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§811.11. Board Responsibilities.
§811.12. Applicant Responsibilities.
§811.13. Recipient Responsibilities.
§811.14. Good Cause for Recipients.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Workforce Commission
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SUBCHAPTER C. CHOICES SERVICES

40 TAC §§811.21 - 811.30

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§811.21. General Provisions.
§811.22. Assessment.
§811.23. Family Employment Plan.
§811.24. Family Work Requirement Form for Two-Parent Families.
§811.25. TANF Core and TANF Non-Core Activities.
§811.26. Special Provisions Regarding Core and Non-Core Activities.
§811.27. Special Provisions for Teen Heads of Household.
§811.28. Special Provisions for Recipients in Single-Parent Families with Children Under Age Six.
§811.29. Special Provisions Regarding Exempt Recipients Who Voluntarily Participate.
§811.30. Special Provisions Regarding Persons with Disabilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Workforce Commission
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SUBCHAPTER D. CHOICES WORK ACTIVITIES

40 TAC §§811.41 - 811.52

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§811.41. Job Search and Job Readiness Assistance.

§811.42. Unsubsidized Employment.

§811.43. Subsidized Employment.

§811.44. On-the-Job Training.

§811.45. Work Experience.

§811.46. Community Service.

§811.47. Child Care Services to a Recipient Participating in Community Service.

§811.48. Vocational Educational Training.

§811.49. Job Skills Training.

§811.50. Educational Services for Recipients Who Have Not Completed Secondary School or Received a Certificate of General Equivalence.

§811.51. Post-Employment Services.

§811.52. Parenting Skills Training.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Workforce Commission
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SUBCHAPTER E. SUPPORT SERVICES AND OTHER INITIATIVES

40 TAC §§811.61 - 811.67

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§811.61. Support Services.

§811.62. Child Care for Choices Individuals.

§811.63. Transportation.

§811.64. Work-Related Expenses.

§811.65. Wheels to Work.

§811.66. Certificate of General Equivalence (GED) Testing Payments.

§811.67. Individual Development Accounts (IDAs).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Workforce Commission
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SUBCHAPTER F. APPEALS

40 TAC §§811.71 - 811.73

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed repeal affects Human Resources Code Title 2, particularly Chapters 31, 34, 44, Human Resources Code.

§811.71. Board Review.

§811.72. Appeals to the Agency.

§811.73. Appeals to the Texas Department of Human Services (TDHS).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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John Moore
General Counsel
Texas Workforce Commission
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For further information, please call: (512) 463-2573

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SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§811.1 - 811.3

The new rules are proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.1. Purpose and Goal.

(a) The purposes of Temporary Assistance for Needy Families (TANF), as set forth in Title IV, Social Security Act, §401 (42 U.S.C.A. §601) are:

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;

(2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(3) prevent and reduce the incidence of out-of-wedlock pregnancies; and

(4) encourage the formation and maintenance of two-parent families.

(b) The goal of Choices services is to end the dependence of needy parents on public assistance by promoting job preparation, work, and marriage. A Board may exercise flexibility in providing services to Choices individuals to meet this Choices goal. A Board is also provided the flexibility and may engage in strategies that promote the prevention and reduction of out-of-wedlock pregnancies and encourage the formation and maintenance of two-parent families if those strategies support the primary goal of Choices services, which is employment and job retention.

(c) The goal of the Commission is to ensure delivery of the employment and training activities as described in the TANF State Plan.

(d) Boards shall identify the workforce needs of local employers and design Choices services to ensure that local employer needs are met and that the services are consistent with the goals and purposes of Choices services as referenced in this section, and as authorized by PRWORA, the applicable federal regulations at 45 C.F.R. Part 260 - 265, the TANF State Plan, this chapter, and consistent with a Board's approved integrated workforce training and services plan as referenced in §801.17 of this title.

§811.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Applicant--An adult, or teen head of household, in a family who applies for temporary cash assistance, who previously did not leave TANF in a sanctioned status.

(2) TDHS--The Texas Department of Human Services.

(3) Earned Income Deduction (EID)--A standard work-related and income deduction, available through the TDHS for four months, as defined in TDHS Rules, 40 TAC, §3.1003 to recipients who are employed at least 30 hours a week and earn at least $700 a month.

(4) Choices Individual--An adult, or teen head of household, in a family who is an applicant, conditional applicant, recipient, former recipient, or sanctioned family as defined in this chapter.

(5) Conditional Applicant--An adult, or teen head of household, in a family who left TANF in a sanctioned status, but who is reapplying for temporary cash assistance.

(6) Mandatory Individual--An adult, or teen head of household, in a family who is a conditional applicant, mandatory recipient, or sanctioned family as defined in this chapter.

(7) PRWORA--The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended.

(8) Recipient--An adult, or teen head of household, in a family who receives temporary cash assistance, and includes:

(A) Exempt Recipient--A recipient who is not required to participate in Choices services, as defined by TDHS Rules, 40 TAC, 3.1101;

(B) Extended TANF Recipient--A recipient who receives TANF cash assistance past the 60-month time limit because of a hardship exemption as defined in TDHS Rules, 40 TAC, §3.6001;

(C) Former Recipient--an adult, or teen head of household, in a family who no longer receives temporary cash assistance because of employment; or

(D) Mandatory Recipient--An adult, or teen head of household, in a family, including extended TANF recipients who are required as defined by TDHS Rules, 40 TAC, §3.1101, and §3.6001, to participate in Choices services.

(9) Sanctioned Family--An adult, or teen head of household, in a family who must demonstrate cooperation for one month in order to reinstate TANF cash assistance.

(10) Temporary cash assistance--The cash grant provided through TDHS to individuals who meet certain residency, income, and resource criteria as provided under federal and state statutes and regulations, including the PRWORA, the TANF block grant statutes, the TANF State Plan, temporary cash assistance provided under Texas Human Resources Code Chapters 31 or 34, and other related regulations. The term is also referred to as "TANF cash assistance."

(11) Work Activity--For the purposes of 45 USCA §607 and 45 CFR §261.10, work activities are defined as:

(A) all activities set forth in the Responsibility Agreement, as set forth in this chapter; and

(B) all TANF Core and Non-Core activities, as set forth in this chapter.

(12) Work-Based Services--Includes those services defined in Human Resources Code §31.0126.

(13) Work Ready--A Choices individual is considered work ready if he or she has the skills that are required by employers in the workforce area. A Board must ensure immediate access to the labor market to determine whether the Choices individual has those necessary skills to obtain employment.

§811.3. Choices Service Strategy.

(a) A Board shall ensure that its strategic planning process includes an analysis of the local labor market to:

(1) determine employers' needs;

(2) determine emerging and demand occupations; and

(3) identify employment opportunities, which includes those with a potential for career advancement.

(b) A Board shall set local policies for a Choices service strategy that coordinates various service delivery approaches to:

(1) assist applicants and conditional applicants in gaining employment as an alternative to public assistance;

(2) utilize a work first design as referenced in paragraph (2) of subsection (c) of this section to provide mandatory individuals, and exempt recipients who voluntarily participate in Choices services, access to the labor market; and

(3) assist former recipients in job retention and career advancement to remain independent of temporary cash assistance.

(c) The Choices service strategy shall include:

(1) Workforce Orientation for Applicants (WOA). As a condition of eligibility, applicants and conditional applicants are required to attend a workforce orientation that includes information on options available to allow them to enter the Texas workforce.

(2) Work First Design.

(A) The work first design:

(i) allows individuals to take immediate advantage of the labor market and secure employment, which is critical due to individual time-limited benefits; and

(ii) meets the needs of employers by linking individuals with skills that match those job requirements identified by the employer.

(B) Boards shall provide individuals access to other services and activities available through the One-Stop Service Delivery Network, which includes the WOA, to assist with employment in the labor market before certification for temporary cash assistance.

(C) Post-employment services shall be provided in order to assist an individual's progress towards self-sufficiency as described in paragraph (3) of subsection (c) of this section and §811.51 of this chapter.

(D) In order to assist an individual's progress toward self-sufficiency:

(i) Boards shall provide Choices individuals who are employed, including those receiving the EID, with information on available post-employment services; or

(ii) Boards may provide Choices individuals with post-employment services as determined by Board policy. The length of time these services may be provided is subject to §811.51 of this chapter.

(E) In order to assist employers, Boards shall coordinate with local employers to address needs related to:

(i) employee post-employment education or training;

(ii) employee child care, transportation or other support services available to obtain and retain employment; and

(iii) employer tax credits.

(F) A Board shall ensure that a family employment plan is based on employer needs, individual skills and abilities, and individual time limits for temporary cash assistance.

(3) Post-Employment Services. A Board shall ensure that post-employment services are designed to assist individuals with job retention, career advancement and reemployment, as defined in §811.51 of this chapter. Post-employment services are a continuum in the Choices service strategy to support an individual's progression to self-sufficiency.

(4) Adult Services. A Board shall ensure that services for adults shall include activities individually designed to lead to employment and self-sufficiency as quickly as possible.

(5) Teen Services. A Board shall ensure that services for teen heads of household shall include assistance with completion of secondary school or a certificate of general equivalence and making the transition from school to employment, as described in §811.27 and §811.50 of this chapter.

(6) Individuals with Disabilities. A Board shall ensure that services for individuals with disabilities include reasonable accommodations to allow the individuals to access and participate in services, where applicable by law A Board shall ensure that Memoranda of Understanding (MOU) are established with the appropriate agencies to serve individuals with disabilities.

(7) Target Populations. A Board shall ensure that services are concentrated, as further defined in §811.11(e) and (f) of this chapter, on the needs of the following:

(A) recipients who have 6 months or less remaining of their state TANF time limit, irrespective of any extension of time due to a hardship exemption;

(B) recipients who have twelve months or less remaining of their 60-month TANF time limit, irrespective of any extension of time due to a hardship exemption; and

(C) recipients who are Extended TANF Recipients.

(8) Local Flexibility. A Board may develop additional service strategies that are consistent with the goal and purpose of this chapter and the One-Stop Service Delivery Network.

(9) Local-Level MOU. A Board shall ensure the development of a local-level MOU in cooperation with TDHS for coordinated case management that is consistent with the MOU between TDHS and the Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

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John Moore
General Counsel
Texas Workforce Commission
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-2573

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SUBCHAPTER B. CHOICES SERVICES RESPONSIBILITIES

40 TAC §§811.11 - 811.16

The new rules are proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.11. Board Responsibilities.

(a) A Board shall ensure that:

(1) procedures are developed, in conjunction with TDHS, to notify applicants and conditional applicants on the availability of regularly scheduled Workforce Orientations for Applicants (WOA) and alternative WOAs;

(2) the WOA is offered frequently enough to allow applicants and conditional applicants to comply with the TDHS requirement that gives applicants ten (10) calendar days to attend a WOA;

(3) during a regularly scheduled WOA or alternative WOA, applicants and conditional applicants are informed of:

(A) employment services available through the One-Stop Service Delivery Network to assist applicants in achieving self-sufficiency without the need for temporary cash assistance;

(B) benefits of becoming employed;

(C) impact of time-limited benefits;

(D) individual and parental responsibilities; and

(E) other services and activities, including education and training, available through the One-Stop Service Delivery Network;

(4) alternative WOAs are developed that allow applicants and conditional applicants with extraordinary circumstances to receive the information listed in §811.11(a)(3) of this subsection;

(5) procedures are developed to notify TDHS of applicants and conditional applicants who contacted the Board's workforce centers to request alternative WOAs;

(6) verification that applicants and conditional applicants attend a scheduled or alternative WOA is completed and TDHS is notified in accordance with TDHS rule, 40 T.A.C. §3.7301; and

(7) applicants and conditional applicants are provided with an appointment to develop a family employment plan.

(b) A Board shall ensure that:

(1) Choices services are offered to applicants who attend a WOA.

(2) Conditional applicants who attend a WOA are immediately scheduled to begin Choices services.

(c) A Board shall ensure that recipient status is verified monthly.

(d) A Board shall establish a collaborative partnership with housing authorities and sponsors of local housing programs and services to address the unmet housing needs of recipients.

(e) A Board shall develop policies and procedures to ensure that services are concentrated on individuals approaching their state or federal time limit, as identified in §811.3(c)(7)(A) and (B) of this chapter. Concentrated services may include targeted outreach, enhanced analysis of circumstances that may limit a recipient's ability to participate, and targeted job development.

(f) A Board shall ensure that all Extended TANF Recipients are outreached and offered the opportunity to participate in Choices activities.

(g) A Board shall ensure that post-employment services, including job retention and career advancement services, are available to Choices individuals including those receiving EID.

(h) A Board shall ensure that the monitoring of Choices requirements and activities is ongoing and frequent, as determined by a Board, and consists of the following:

(1) ensuring receipt of support services

(2) tracking and reporting of support services;

(3) tracking and reporting actual hours of participation, at least monthly;

(4) determining and arranging for any intervention needed to assist the individual in complying with Choices service requirements;

(5) ensuring that the individual is progressing toward achieving the goals and objectives in the family employment plan; and

(6) monitoring all other participation requirements.

(i) A Board shall ensure that:

(1) no less than four hours of training regarding family violence is provided to staff who:

(A) provide information to Choices individuals;

(B) recommend penalties or grant good cause; or

(C) provide employment planning or employment retention services;

(2) Choices individuals who are identified as being victims of family violence are referred to an individual or an agency that specializes in issues involving family violence.

(j) A Board shall ensure that documentation is obtained and maintained regarding all contact with Choices individuals and data entered into TWIST.

(k) A Board shall ensure that a referral program is developed to provide Choices individuals with higher than average barriers to employment, as described in this chapter, with referrals to pre-employment and post-employment services offered by community-based and other organizations.

§811.12. Applicant Responsibilities.

Applicants and conditional applicants are required to attend a scheduled or an alternative WOA, in accordance with TDHS rule 40 T.A.C. §§3.7301-3.7302.

§811.13. Responsibilities of Mandatory Individuals.

(a) A Board shall ensure that mandatory individuals , and exempt recipients who voluntarily participate in Choices services, comply with the provisions contained in this section.

(b) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall:

(1) accept a job offer at the earliest possible opportunity;

(2) participate in or receive ancillary services necessary to enable mandatory individuals to work or participate in employment-related activities, including counseling, treatment, vocational or physical rehabilitation, and medical or health services;

(3) report hours of participation in component activities, including hours of employment; and

(4) attend scheduled appointments.

(c) Within two-parent families, mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall participate in assessment and family employment planning appointments and assigned employment and training activities as follows:

(1) participate in Choices employment and training as specified in §811.25(c)-(d) of this chapter;

(2) comply with requirements regarding core and non-core activities, as specified in §§811.25-811.30 of this chapter; and

(3) sign a form that contains all the information identified in the Commission's Family Work Requirement form, as described in §811.24 of this chapter.

(d) Within single-parent families, mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall participate in assessment and employment planning appointments and assigned employment and training activities as follows:

(1) participate in Choices employment and training activities as specified in §811.25(b) of this chapter; and

(2) comply with requirements regarding core and non-core activities, as specified in §§811.25-811.30 of this chapter.

(e) A Board shall ensure that recipients who elect to receive the EID through TDHS:

(1) report actual hours of work to a Board; and

(2) are provided with information on available post-employment services.

§811.14. Noncooperation.

(a) A Board shall ensure that cooperation by mandatory individuals with Choices requirements is verified each month to ensure that the individuals:

(1) comply with Choices services requirements as set forth in the family employment plan, unless the recipient is exempted by TDHS;

(2) have good cause as described in this chapter; or

(3) have not cooperated with Choices requirements and a penalty is requested.

(b) A Board shall ensure that timely and reasonable attempts, as defined by the Board, are made to contact a recipient prior to initiating a penalty to:

(1) determine the reason for noncooperation;

(2) inform the recipient of:

(A) the violation, if good cause has not been determined;

(B) the right to appeal; and

(C) the necessary procedures to demonstrate cooperation.

(c) A Board shall ensure that timely and reasonable attempts, as defined by the Board, are made to contact a sanctioned family and conditional applicants upon discovery of noncooperation to determine if good cause exists.

(d) A Board shall ensure that the reasonable attempts to contact a mandatory individual are documented.

(e) A Board shall ensure that TDHS is notified of:

(1) a recipient's failure to comply with Choices services requirements; and

(2) that the noncooperation is submitted as early as possible in the same month in which the noncooperation occurs.

§811.15. Demonstrated Cooperation.

(a) Conditional applicants are required to demonstrate one month of cooperation to become eligible for reinstatement of TANF cash assistance.

(b) Sanctioned families are required to demonstrate one month of cooperation as a condition of eligibility for TANF cash assistance.

(c) A Board shall ensure that TDHS is immediately notified if:

(1) a sanctioned family denied TANF cash assistance because of one month of noncooperation has demonstrated full cooperation with Choices requirements for the program month immediately following the program month in which the family noncooperated;

(2) a conditional applicant whose TANF case is closed because of two or more months of noncooperation has demonstrated full cooperation with Choices requirements for four consecutive weeks; or

(3) a sanctioned family or conditional applicant has been granted good cause during the demonstrated cooperation period.

§811.16. Good Cause for Mandatory Individuals.

(a) Good cause applies only to mandatory individuals, and exempt recipients who voluntarily participate in Choices services. A Board shall ensure that good cause is determined as provided in this chapter.

(b) A Board shall ensure that a good cause determination:

(1) is based on individual and family circumstances;

(2) is based on face-to-face or telephone contact;

(3) covers a temporary period when mandatory individuals, or exempt recipients who voluntarily participate in Choices services, may be unable to attend scheduled appointments or participate in ongoing work activities;

(4) is made at the time the change in circumstances is made known to the Board's service provider; and

(5) is conditional upon efforts to address circumstances that limit the ability to participate in Choices services as required in the Responsibility Agreement.

(c) The following reasons may constitute good cause for purposes of this chapter:

(1) temporary illness or incapacitation;

(2) court appearance;

(3) caring for a physically or mentally disabled household member who requires the recipient's presence in the home;

(4) a demonstration that there is:

(A) no available transportation and the distance prohibits walking; or

(B) no available job within reasonable commuting distance, as defined by the Board;

(5) an inability to obtain needed child care, as defined by the Board and based on the following reasons:

(A) informal child care by a relative or under other arrangements is unavailable or unsuitable, and based on, where applicable, Board policy regarding child care as specified in §811.47 of this chapter. Informal child care may also be determined unsuitable by the parent;

(B) eligible formal child care providers are unavailable, as defined in Chapter 809 of this title;

(C) affordable formal child care arrangements within maximum rates established by the Board are unavailable; and

(D) formal or informal child care within a reasonable distance from home or the work site is unavailable;

(6) is without other support services necessary for participation;

(7) receives a job referral that results in an offer below the federal minimum wage, except when a lower wage is permissible under federal minimum wage law;

(8) is in a family crisis or a family circumstance that may preclude participation, including substance abuse, and mental health, provided the mandatory individual, or exempt recipient who voluntarily participates in Choices services, engages in problem resolution through appropriate referrals for counseling and support services; or

(9) is a victim of family violence.

(d) A Board shall promulgate policies and procedures for determining a family's inability to obtain child care and shall ensure

that mandatory individuals in single-parent families caring for children under age six are informed of:

(1) the penalty exception to the family work requirement, including the criteria and applicable definitions for determining whether a mandatory individual has demonstrated an inability to obtain needed child care, as defined in §811.16(c)(5)(A)-(D) of this section.

(2) a Board's policy and procedures for determining a family's inability to obtain needed child care, and any other requirements or procedures, such as fair hearings, associated with this provision, as required by 45 CFR §261.56.

(e) A Board shall ensure that good cause:

(1) is reevaluated at least on a monthly basis;

(2) is extended if the circumstances giving rise to the good cause exception are not resolved after available resources to remedy the situation have been considered; and

(3) that is based on the existence of family violence does not exceed a total of twelve consecutive months per occurrence.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Workforce Commission
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SUBCHAPTER C. CHOICES SERVICES

40 TAC §§811.21 - 811.32

The new rules are proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.21. General Provisions.

(a) A Board shall ensure that services are available to assist Choices individuals with obtaining employment as quickly as possible and, if employed, with retaining employment. These services may include:

(1) job readiness and job search-related services;

(2) work-based services;

(3) post-employment services;

(4) education and training services as described in this chapter; and

(5) support services.

(b) A Board shall ensure that employment and training activities are conducted in compliance with the Fair Labor Standards Act (FLSA) as follows:

(1) the amount of time per week that a recipient may be required to participate in activities that are not exempt from minimum wage and overtime under the FLSA shall be determined by the temporary cash assistance and food stamp benefits amount being divided by the minimum wage so that the amount paid to the recipient would be equal to or more than the amount required for payment of wages, including minimum wage and overtime; or

(2) the amount of time per week that a sanctioned family or conditional applicant may be required to participate in activities that are not exempt from minimum wage and overtime under the FLSA shall be determined by the food stamp benefits amount being divided by the minimum wage so that the amount paid to the sanctioned individual would be equal to or more than the amount required for payment of wages, including minimum wage and overtime; and

(3) if a Board provides activities that meet all of the following categories set forth in this paragraph, the activity is considered "training" under the FLSA and minimum wage and overtime is not required:

(A) the training is similar to that given in a vocational school;

(B) the training is for the benefit of the trainees;

(C) trainees do not displace regular employees;

(D) employers derive no immediate advantage from trainees' activities;

(E) trainees are not entitled to a job after training is completed; and

(F) employers and trainees understand that trainee is not paid.

(c) A Board shall ensure that placement in work-based services does not result in the displacement of currently employed workers or impair existing contracts for services or collective bargaining agreements.

(d) A Board may, through local policies and procedures, require the use of the Eligible Training Provider Certification System (ETPS) and Individual Training Account (ITA) systems as described in 40 T.A.C. Chapter 841 to provide for Choices services for individuals participating in Choices services and paid for with TANF funds.

(e) A Board shall, through local policies and procedures, make available job development services, which include:

(1) contacting local employers or industry associations to request that job openings be listed with Texas Workforce Centers, and other entities in the One-Stop Service Delivery Network selected by the Board;

(2) identifying the hiring needs of employers;

(3) assisting the employer in creating new positions for job seekers based on the job developer's and employer's analysis of the employer's business needs; or

(4) finding opportunities with an employer for a specific job seeker or a group of job seekers.

(f) A Board shall ensure that job development services identify, at a minimum, job openings for current mandatory individuals.

(g) A Board shall, through local policies and procedures, make available job placement services. Job placement services shall include:

(1) identifying employers' workforce needs;

(2) identifying job seekers who have sufficient skills and abilities to be successfully linked with employment; and

(3) matching the skills of the job seeker pool to the hiring needs of local employers.

§811.22. Assessment.

(a) A Board shall ensure that initial and ongoing assessments are performed to determine the employability and retention needs of Choices individuals as follows:

(1) An assessment is required for mandatory individuals, and for exempt recipients who voluntarily participate in Choices services, and who are:

(A) at least age 18; or

(B) heads of household, as determined by TDHS, who are not yet age 18, have not completed secondary school or received a certificate of general equivalence, and are not attending secondary school.

(2) An assessment shall be provided to applicants who choose to participate in Choices services.

(3) Ongoing assessments shall be provided to former recipients who choose to participate in Choices services.

(b) Assessments shall include evaluations of strengths and potential barriers to obtaining and retaining employment, such as:

(1) skills and abilities, employment, and educational history in relation to employers' workforce needs in the local labor market;

(2) pre-and post-employment skills development needs to determine the necessity for job-specific training;

(3) support services needs; and

(4) family circumstances that may affect participation, including the existence of family violence, substance abuse, and mental health, or the need for parenting skills training, as one of the factors considered in evaluating employability.

(c) A Board shall ensure that the assessment identifies Choices individuals with higher than average barriers to employment, as defined by the Board.

(d) For mandatory individuals who are at least age 18, or who are heads of household but are not yet age 18 and have not completed secondary school or received a certificate of general equivalence and are not attending secondary school:

(1) The assessments shall also include evaluations of the mandatory individual's:

(A) vocational and educational skills, experience, and needs; and

(B) literacy level by using a statewide standard literacy assessment instrument with the following exception: recipients receiving the EID are excluded from the literacy assessment. A Board shall ensure that the grade-level results or other literacy information is provided to TDHS for use in determining the appropriateness of the initial state time-limit designation for temporary cash assistance as described in the Texas Human Resources Code §31.0065, relating to state time-limited benefits.

(2) The grade-level results or other literacy information are provided to TDHS for use in determining the appropriateness of the initial state time-limit designation for temporary cash assistance as described in the Texas Human Resources Code §31.0065, relating to state time-limited benefits.

(e) Assessment Outcome. Assessments shall result in the development of a family employment plan, as described in §811.23 of this subchapter.

§811.23. Family Employment Plan.

(a) Boards must ensure that prior to the development of a family employment plan, mandatory individuals receive general information about services provided through the One-Stop Service Delivery Network that will assist them in obtaining employment, if the recipient did not receive this information during the WOA.

(b) Family employment plans are required for mandatory individuals, and exempt recipients who voluntarily participate in Choices services.

(c) Family employment plans shall be developed with applicants and former recipients who choose to participate in Choices services.

(d) A Board shall ensure that a family employment plan is developed during the assessment and:

(1) is based on assessments, as described in §811.22 of this subchapter;

(2) contains the goal of self-sufficiency through employment to meet the needs of the local labor market;

(3) contains the steps and services to achieve the goal, including:

(A) connecting the job seeker immediately to the local labor market;

(B) addressing potential barriers that limit the job seeker's ability to work or participate in activities;

(C) arranging support services for the job seeker or the family to address circumstances that limit the individual's ability to work or participate, including services for family violence;

(D) developing specific post-employment targets with methods and time frames for reaching the goal of a self-sufficiency wage; and

(E) requiring mandatory individuals to notify the Board's service provider of changes in family circumstances that may preclude participation in Choices services.

(4) is signed by the Choices individual, unless the Choices individual is a recipient receiving the EID, and a Board's service provider; and

(5) assigns required hours and sets forth the participation agreement for compliance with Choices services requirements. Family employment plans for two-parent families must include a description of how the required hours of participation will be distributed between one or both adults in the two-parent household.

(e) A Board shall ensure that the family employment plan contains the responsibilities listed in the Responsibility Agreement, which state that:

(1) each adult member of the household receiving cash assistance must participate as required in Choices;

(2) each family must cooperate with child support requirements to establish paternity and help obtain child support for children on their case;

(3) each adult or teen parent must not voluntarily quit a job without good cause;

(4) each child in the family must get a medical checkup as scheduled through the Texas Health Steps program;

(5) each child must be current with the required immunizations;

(6) each child receiving TANF who is younger than 18, or a teen parent younger than 19, must attend school regularly unless the child has a high school diploma or a GED;

(7) each TANF recipient must attend parenting skills classes, if requested to do so;

(8) each parent or relative of a child receiving assistance must not use, sell, or possess controlled substances or abuse alcohol after signing a Responsibility Agreement; and

(9) each family must truthfully represent their situation in completing the application, the interview, providing proof of their situation, reporting changes in address, income, assets, and family size, and by keeping or rescheduling all appointments.

(f) A Board shall ensure that the responsibilities in §811.23(e)(1) and (3) of this section are monitored for compliance.

(g) A Board shall ensure that progress towards meeting the goals of the family employment plan is evaluated and the family employment plan is modified as appropriate to meet employer needs in the local labor market.

§811.24. Family Work Requirement Form for Two-Parent Families.

A Board shall ensure that a Family Work Requirement form is developed for all two-parent families that:

(1) contains an agreement by both adults in the family to comply with the family work requirements through distribution of required hours of participation between one or both adults in the two-parent family; and

(2) is signed by the adults in the household that are required to participate in Choices services, except for the following:

(A) mandatory individuals who are temporarily unable to sign the form, such as a recipient who is temporarily unavailable; or

(B) recipients receiving the EID whose only participation requirement is to report their hours of employment.

§811.25. TANF Core and TANF Non-Core Activities.

(a) Participation hours are subject to the restrictions regarding TANF core and TANF non-core activities as set forth in 45 C.F.R. §261.31, §261.32 and §261.33, and as set forth in this section and §811.26 of this subchapter.

(1) TANF core activities are:

(A) job search and job readiness assistance, as described in §811.41 of this chapter;

(B) unsubsidized employment, as described in §811.42 of this chapter;

(C) subsidized employment, as described in §811.43 of this chapter;

(D) on-the-job training, as described in §811.44 of this chapter;

(E) work experience, as described in §811.45 of this chapter;

(F) community service, as described in §811.46 of this chapter;

(G) vocational educational training, as described in §811.48 of this chapter; or

(H) child care services to a mandatory recipient, or exempt recipient who voluntarily participates in Choices services, who is participating in community service, as described in §811.47 of this chapter.

(2) TANF non-core activities are:

(A) job skills training, as described in §811.49 of this chapter;

(B) educational services for mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who have not completed secondary school or received a certificate of general equivalence, as described in §811.50 of this chapter.

(b) A mandatory individual, and exempt recipient who voluntarily participate in Choices services, in a single-parent family is deemed to be engaged in work during the month if he or she participates for at least a minimum weekly average of thirty hours. An average of twenty hours per week must be derived from participation in core activities. Up to an average of ten hours per week may be derived from participation in non-core activities.

(c) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, in two-parent families who are not receiving Commission-funded child care are deemed to be engaged in work during the month if one or both adults in the family participate for at least a minimum weekly average of thirty-five hours. An average of thirty hours per week must be derived from participation in core activities. Up to an average of five hours per week may be derived from participation in non-core activities.

(d) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, in two-parent families who are receiving Commission-funded child care are deemed to be engaged in work during the month if one or both adults in the family participate for at least a minimum weekly average of fifty-five hours. An average of fifty hours per week must be derived from participation in core activities. Up to an average of five hours per week may be derived from participation in non-core activities. The following work participation exceptions apply to two-parent families who are receiving Commission-funded child care:

(1) two-parent families with one adult in good cause status are deemed to be engaged in work during the month if the adult who is not in good cause status participates for at least a minimum weekly average of thirty-five hours. An average of thirty hours per week must be derived from participation in core activities. Up to an average of five hours per week may be derived from participation in non-core activities; or

(2) two-parent families with both adults in good cause status for whom no penalty will be requested for failure to meet the minimum weekly average hours based on the good cause determination.

§811.26. Special Provisions Regarding Core and Non-Core Activities.

(a) Mandatory recipients, with the exception of those described in §811.27 and §811.30 of this subchapter, who are not in an employment activity after four weeks of participation in Choices services, must be placed into community service. Mandatory recipients who are not in an employment activity after reaching their six-week limit per federal fiscal year in job search and job readiness activities must be placed into community service. Mandatory recipients required to participate in a community service activity must be scheduled to participate no less than the minimum weekly average hours calculated as specified in §811.21(b) of this subchapter.

(1) An employment activity is defined as:

(A) unsubsidized employment, as described in §811.42 of this chapter;

(B) subsidized employment, as described in §811.43 of this chapter;

(C) on-the-job training, as described in §811.44 of this chapter; or

(D) work experience, as described in §811.45 of this chapter.

(2) The number of hours that a recipient is required to participate in community service or another unpaid work activity, must be determined in compliance with the FSLA as described in §811.21(b) of this subchapter. If a recipient's hours of community service or other unpaid work activity are not sufficient to meet the core work activities requirement as set forth in §811.25 (b)-(d) of this subchapter, the recipient must be enrolled in additional core activities.

(b) Exempt recipients who voluntarily participate in Choices services are not subject to the requirements set forth in §811.26(a) of this section.

(c) Recipients participating in unsubsidized employment in §811.26(a)(1)(A) of this section who lose that employment may participate in job search and job readiness activities unless they have reached the six-week limit per federal fiscal year.

(d) Job search and job readiness activities, as defined in §811.41 of this chapter, are limited as follows:

(1) mandatory recipients, and exempt recipients who voluntarily participate in Choices services, may not be enrolled for more than 4 weeks of consecutive activity;

(2) mandatory recipients, and exempt recipients who voluntarily participate in Choices services, may not be enrolled for more than 6 weeks of total activity in a federal fiscal year;

(3) in order for a mandatory recipient to qualify for their remaining 2 weeks of job search and job readiness, they must first comply with §811.26(a) of this section, which requires that the mandatory recipient be engaged in an employment activity or in community service; and

(4) only once per federal fiscal year, may a partial week count as a full week of participation, per recipient.

(e) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, may not be enrolled in vocational education training, as defined in §811.48 of this chapter, for more than a cumulative total of 12 months.

(f) No more than thirty percent of mandatory individuals, and exempt recipients who voluntarily participate in Choices services, engaged in work activities in a month may be included in the Board's numerator because they are:

(1) participating in vocational educational training; and

(2) teen heads of household participating in educational activities as described in §811.27 of this subchapter.

(g) Mandatory individuals, and exempt recipients who voluntarily participate in Choices services, shall only be enrolled in core and non-core activities.

§811.27. Special Provisions for Teen Heads of Household.

(a) A Board must ensure that teen heads of household who have not completed secondary school or received a certificate of general equivalence are enrolled in educational activities as defined in §811.50 of this chapter.

(b) Teen heads of household who have not completed secondary school or received a certificate of general equivalence will count as engaged in work if they:

(1) maintain satisfactory attendance at a secondary school or the equivalent during the month as follows;

(A) during months in which school is in session, maintains satisfactory attendance;

(B) in months in which school is not in session, participates in allowable activities as described in §811.25 of this subchapter; or

(2) participate in education directly related to employment for an average of at least 20 hours per week during the month; or

(3) participate in Choices employment and training activities as specified in §811.25 of this subchapter.

§811.28. Special Provisions for Mandatory Individuals, and Exempt Recipients Who Voluntarily Participate in Choices Services, in Single-Parent Families with Children Under Age Six.

(a) A Board shall ensure that mandatory individuals, and exempt recipients who voluntarily participate in Choices services, in single-parent families with children under age six are notified of the penalty exception to Choices participation as described in §811.16(d) of this chapter.

(b) A mandatory individual, and exempt recipient who voluntarily participates in Choices services, in a single-parent family will count as engaged in work if he or she participates for at least an average of twenty hours per week in core activities.

§811.29. Special Provisions Regarding Exempt Recipients Who Voluntarily Participate.

Boards are not required to provide Choices services as set forth in §§811.25-811.30 of this subchapter to exempt recipients who fail to meet work requirements.

§811.30. Special Provisions Regarding Persons with Disabilities.

(a) Mandatory individuals who are disabled shall count as engaged in work to the extent that the individuals:

(1) participate in Choices employment and training activities for the time period and to the extent determined able as specified by a physician; or

(2) participate in activities as directed by the Texas Rehabilitation Commission or similar organization.

(b) Mandatory individuals needed at home to care for a disabled adult in the household shall count as engaged in work if the recipient participates in Choices services for a time period and to the extent determined able as specified by a physician.

(c) Mandatory individuals who are needed at home to care for an ill or disabled child in the household shall count as engaged in work if the recipient participates in Choices services for a time period and to the extent determined able as specified by a physician.

§811.31. Special Provisions Regarding Conditional Applicants.

A Board shall ensure that conditional applicants enrolled in job search activities, as described in this chapter, receive staff-assisted services.

§811.32. Special Provisions Regarding Sanctioned Families.

A Board shall ensure that sanctioned families enrolled in job search activities, as described in this chapter, receive staff-assisted services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. CHOICES WORK ACTIVITIES

40 TAC §§811.41 - 811.52

The new rules are proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.41. Job Search and Job Readiness Assistance.

(a) Job search and job readiness are core activities as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that job search and job readiness services:

(1) incorporate the following:

(A) individual and group activities;

(B) staff-assisted services in which workforce center staff provide direction and guidance to job seekers, including appropriate referrals based on their skills and abilities and pre-scheduled job interviews; and

(C) client-directed activities.

(2) are limited to activities necessary for Choices individuals to secure immediate employment.

(3) provide individual assistance or coordinated, planned, and supervised activities that prepare Choices individuals for seeking employment, and including but are not limited to, the following:

(A) job skills assessment;

(B) job placement;

(C) counseling;

(D) information on available jobs;

(E) occupational exploration, including information on local emerging and demand occupations;

(F) interviewing skills and practice interviews;

(G) assistance with applications and resumes;

(H) job fairs;

(I) life skills; or

(J) guidance and motivation for development of positive work behaviors necessary for the labor market.

(4) are time-limited as defined in this subchapter.

§811.42. Unsubsidized Employment.

(a) Unsubsidized employment is a core activity as defined in §811.25(a)(1) of this chapter.

(b) Unsubsidized employment includes the following:

(1) full or part-time employment, in which wages are paid in full by the employer;

(2) unsubsidized internship with wages paid by the internship employer; and

(3) self-employment.

§811.43. Subsidized Employment.

(a) Subsidized employment is a core activity as defined in §811.25(a)(1) of this chapter.

(b) Subsidized employment is full or part-time employment that is subsidized in full or in part and complies with this section. Subsidized employment may occur in either the private sector or public sector. A Board shall not be the employer of record for Choices individuals enrolled in a subsidized employment activity. Subsidized employment includes but is not limited to the following:

(1) subsidized internship with a portion of the Choices individual's wages subsidized;

(2) subsidized employment with a staffing agency acting as the employer of record; and

(3) subsidized employment with the actual employer acting as the employer of record.

(c) Wages.

(1) Wages shall be at least federal or State minimum wage, whichever is higher. Boards must set a policy to establish the amount of the wage that is subsidized.

(2) Employers must provide the same wages and benefits to subsidized employees as for unsubsidized employees with similar skills, experience, and position.

§811.44. On-the-Job Training.

(a) On-the-job training is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made on a case-by-case basis whether to authorize, arrange, or refer a Choices individual for subsidized, time-limited training activities, to assist the Choices individual with obtaining knowledge and skills that are essential to the workplace while in a job setting. On-the-job training is training by an employer that is provided to a Choices individual while engaged in productive work in a job that:

(1) provides knowledge or skills essential to the full and adequate performance of the job;

(2) provides reimbursement to the employer of a percent of the wage rate of the Choices individual for the extraordinary costs of providing the training and additional supervision related to the training;

(3) is limited in duration as appropriate to the occupation for which the Choices individual is being trained, taking into account the content of the training, the prior work experience of the Choices individual, and the service strategy of the Choices individual, as appropriate; and

(4) includes training specified by the employer.

(c) Unsubsidized employment after satisfactory completion of the training is expected. A Board shall not contract with employers who have previously exhibited a pattern of failing to provide Choices individuals in on-the-job training with continued long-term employment, which provides wages, benefits, and working conditions that are equal to those that are provided to regular employees who have worked a similar length of time and are doing a similar type of work.

§811.45. Work Experience.

(a) Work experience is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made on a case-by-case basis whether to authorize, arrange, or refer mandatory individuals, and exempt recipients who voluntarily participate in Choices services, for unsalaried, work-based training positions in the private for-profit sector to improve the employability of a mandatory individual who has been unable to find employment.

(c) A Board shall ensure that all mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are unemployed after completing job search services are evaluated on an individual basis to determine if enrollment in work experience shall be required, based on available resources and the local labor market.

(d) A Board shall ensure that each work experience placement:

(1) is time-limited;

(2) is designed to move the mandatory individuals, and exempt recipients who voluntarily participate in Choices services, quickly into regular employment; and

(3) has designated hours, tasks, skills attainment objectives, and staff supervision.

(e) A Board shall ensure that entities that enter into non-financial agreements with a Board, identify work experience positions and provide job training and work experience within their organization. These positions shall enable mandatory individuals, and exempt recipients who voluntarily participate in Choices services, to gain the skills necessary to compete for positions within the entity as well as positions in the labor market.

§811.46. Community Service.

(a) Community service is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made, on a case-by-case basis, whether to authorize, arrange, or refer mandatory individuals, and exempt recipients who voluntarily participate in Choices services, to a community service program that provides employment or training activities to recipients through unsalaried, work-based positions in the public or private nonprofit sectors to improve the employability of recipients who have been unable to find employment.

(c) A Board shall ensure that all mandatory recipients subject to §811.26(a) of this chapter are referred to a community service program.

§811.47. Child Care Services to a Mandatory Recipient, or Exempt Recipient Who Voluntarily Participates in Choices Services, Participating in Community Service.

(a) Child care services to a mandatory recipient, or exempt recipient who voluntarily participates in Choices services, participating in community service is a core activity as defined in §811.25 of this chapter.

(b) A mandatory recipient, or exempt recipient who voluntarily participates in Choices services, may provide child care services for another recipient who is engaged in a community service activity, as described in §811.46 of this subchapter. The hours spent by the recipient providing child care are considered a core activity. Boards that elect to allow this activity must set local policies which include:

(1) ensuring the health, safety and well-being of the children in care;

(2) limits on the maximum number of children that may be cared for; and

(3) the methodology and mechanism for reporting hours of participation by recipients.

§811.48. Vocational Educational Training.

(a) Vocational educational training is a core activity as defined in §811.25(a)(1) of this chapter.

(b) A Board shall ensure that a determination is made, on a case-by-case basis, whether to authorize, arrange, or refer Choices individuals for vocational educational training. Services provided by the Texas Rehabilitation Commission may be counted as vocational education training if the service provided to the Choices individual leads to employment.

(c) The vocational educational training shall:

(1) relate to the types of jobs available in the labor market;

(2) be consistent with employment goals identified in the family employment plan, when possible;

(3) be provided only if there is an expectation that employment will be secured upon completion of the training; and

(4) be subject to the time limitations as detailed in this subchapter.

(d) Boards may count up to 5 hours per week of study or homework time toward a mandatory individual's, and exempt recipient who voluntarily participates in Choices services, family participation requirement if:

(1) study or homework time is directly correlated to the demands of the course work for out-of-class preparation as described by the educational institution;

(2) the educational institution's policy requires a certain number of out-of-class preparation hours for the class;

(3) study or homework time has been directly verified from the educational institution; and

(4) the mandatory individual, or exempt recipient who voluntarily participates in Choices services, is making progress as determined by the educational institution.

§811.49. Job Skills Training.

(a) Job skills training is a non-core activity as defined in §811.25(a)(2) of this chapter.

(b) Job skills training services are designed to increase a Choices individual's employability. Job skills training may also include activities ensuring that Choices individuals become familiar with workplace expectations and exhibit work behavior and attitudes necessary to compete successfully in the labor market. Various types of activities, which are directly related to employment, may qualify, such as personal development and preemployment classes.

(c) A Board shall ensure that a determination is made on a case-by-case basis whether to authorize, arrange, or refer Choices individuals for job skills training as set forth in the family employment plan.

(d) Job skills training shall be:

(1) directly related to employment; and

(2) consistent with employment goals identified in the family employment plan, when possible.

(e) Job skills training includes:

(1) Adult Basic Education (ABE), English-as-a-Second-Language (ESL), or Workforce Adult Literacy services:

(2) entrepreneurial training provided prior to business start up; and

(3) self-employment assistance:

(A) to Choices individuals currently engaged in operating a small business;

(B) to Choices individuals based upon an objective assessment process that identifies individuals who are likely to succeed; and

(C) which may include microenterprise services such as:

(i) business counseling;

(ii) financial assistance; and

(iii) technical assistance.

(f) Boards may count up to 5 hours per week of study or homework time toward a mandatory individual's, and exempt recipient who voluntarily participates in Choices services, family participation requirement if:

(1) study or homework time is directly correlated to the demands of the course work for out-of-class preparation as described by the educational institution;

(2) the educational institution's policy requires a certain number of out-of-class preparation hours for the class;

(3) study or homework time has been directly verified from the educational institution; and

(4) the mandatory individual, or exempt recipient who voluntarily participates in Choices services, is making progress as determined by the educational institution.

§811.50. Educational Services for Mandatory Individuals, and Exempt Recipients who Voluntarily Participate in Choices Services, who have not Completed Secondary School or Received a Certificate of General Equivalence.

(a) Educational services are only available for mandatory individuals and exempt recipients who voluntarily participate in Choices services, who have not completed secondary school or who have not received a certificate of general equivalence as follows.

(1) Educational services for mandatory individuals, and exempt recipients who voluntarily participate in Choices services, age 20 or older are non-core activities as defined in §811.25(a)(2) of this chapter.

(2) Educational services for mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are teen heads of household age 19 and younger are core activities as defined in §811.27 of this chapter.

(b) A Board shall ensure that a determination is made, on a case-by-case basis, whether to authorize, arrange, or refer mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are age 20 and older for the following educational or other training services:

(1) secondary school leading to a high school diploma or a certificate of general equivalence;

(2) Workforce Adult Literacy; or

(3) other educational activities which are directly related to employment.

(c) Boards may count up to 5 hours per week of study or homework time toward a mandatory individual's, and exempt recipient who voluntarily participates in Choices services, family participation requirement if:

(1) study or homework time is directly correlated to the demands of the course work for out-of-class preparation as described by the educational institution;

(2) the educational institution's policy requires a certain number of out-of-class preparation hours for the class;

(3) study or homework time has been directly verified from the educational institution; and

(4) the mandatory individual, or exempt recipient who voluntarily participates in Choices services, is making progress as determined by the educational institution.

§811.51. Post-Employment Services.

(a) A Board shall ensure that post-employment services, which include job retention, career advancement, and reemployment services, are offered to mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are employed, and to applicants and former recipients who have obtained employment but require additional assistance in retaining employment and achieving self-sufficiency.

(b) A Board shall ensure that post-employment services are monitored, and ensure that hours of employment are required and reported by mandatory recipients, and exempt recipients who voluntarily participate in Choices services, for at least the length of time the mandatory recipients, and exempt recipients who voluntarily participate in Choices services, receive temporary cash assistance.

(c) A Board shall ensure that ongoing contact is established with Choices individuals receiving post-employment services at least monthly.

(d) A Board may include mentoring techniques as part of a post-employment strategy.

(e) A Board may, through local policies and procedures, make post-employment services available to:

(1) former recipients who are denied temporary cash assistance because of earnings; and

(2) sanctioned families and conditional applicants who obtain employment during the one month of demonstrated cooperation.

(f) The post-employment services may include the following:

(1) assistance and support for the transition into employment through direct services or referrals to resources available in the workforce area;

(2) child care, if needed, as specified in rules at 40 T.A.C. Chapter 809;

(3) work-related expenses, including those identified in §811.64 of this chapter;

(4) transportation, if needed;

(5) job search, job placement, and job development services to help a former recipient who loses a job to obtain employment; or

(6) referrals to available education or training resources to increase an employed individual's skills or to help the individual qualify for advancement and long-term employment goals.

(g) The maximum length of time a former recipient, conditional applicant, and sanctioned family may receive services under this section is dependent upon:

(1) family circumstances;

(2) the risk of returning to public assistance. A person is considered at risk of returning to temporary cash assistance if he or she is a food stamp recipient, or receives Commission-funded child care;

(3) the ongoing need for these services; and

(4) the availability of funds for these services.

(h) Post-employment service providers may include employers, community colleges, technical colleges, proprietary schools, faith-based and community-based organizations.

§811.52. Parenting Skills Training.

A Board shall ensure that a determination is made, on a case-by-case basis and as determined during the assessments described in §811.22 of this chapter, whether to authorize, arrange, or refer Choices individuals for parenting skills training including one or more of the following: nutrition education, budgeting and life skills, and instruction on the necessity of physical and emotional safety for children.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. SUPPORT SERVICES AND OTHER INITIATIVES

40 TAC §§811.61 - 811.67

The new rules are proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.61. Support Services.

(a) A Board shall ensure that support services as specified in this subchapter are provided, if needed, to Choices individuals to address barriers to employment or participation in Choices services, subject to availability of resources and funding. A Board shall ensure that support services provided to Choices individuals are coordinated with the employer, when appropriate.

(b) A Board shall ensure that support services, including Commission-funded child care, are provided only to mandatory individuals, and exempt recipients who voluntarily participate in Choices services, who are meeting requirements set forth in §811.16, §811.23, §§811.25-811.30 of this chapter, and as set forth in §809.102 of this title. In applying this provision, a Board shall ensure support services are provided to a mandatory individual, and an exempt recipient who voluntarily participates in Choices services, if it is determined support services are needed to comply with requirements set forth in §811.16, §811.23, and §§811.25-811.30 of this chapter, and as set forth in §809.102 of this title.

(c) A Board shall ensure that:

(1) support services are terminated immediately upon a determination of a mandatory individual's, or exempt recipient who voluntarily participates in Choices services, failure to meet Choices requirements, unless otherwise determined by the Board's service provider as referenced in subsection (b) of this section;

(2) the Board's child care service provider is notified immediately of the failure to meet Choices requirements; and

(3) upon notification, the Board's child care service provider immediately notifies the child care provider that services are terminating due to failure to meet Choices requirements.

(d) A Board shall ensure that support services, classified as cash assistance, for:

(1) applicants and former recipients do not extend beyond four months for those who are unemployed and not receiving temporary cash assistance; and

(2) unemployed conditional applicants and sanctioned families do not extend beyond the one month of demonstrated cooperation.

§811.62. Child Care for Choices Individuals.

(a) A Board shall ensure that child care is provided if needed, as specified in Chapter 809 of this title.

(b) Transitional child care is provided as needed, as specified in §809.101 of this title.

(c) Choices child care is provided as needed, as specified in §809.102 of this title.

(d) Applicant child care is provided as needed, as specified in §809.103 of this title.

§811.63. Transportation.

A Board shall ensure that transportation assistance shall:

(1) be provided if needed to enable a Choices individual to work, attend, and participate in required Choices services, or access necessary support services if alternative transportation resources are not available; and

(2) use the most economical means of transportation that meets the Choices individual's needs.

§811.64. Work-Related Expenses.

(a) If other resources are not available, work-related expenses necessary for Choices individuals to accept or retain specific and verified job offers that pay at least the federal minimum wage may be provided or reimbursed.

(b) A Board shall ensure that written policies are developed related to the methods and limitations for provision of work-related expenses.

(c) Work-related expenses may include: tools, uniforms, equipment, transportation, car repairs, housing or moving expenses, and the cost of vocationally required examinations or certificates.

§811.65. Wheels to Work.

(a) The Commission may develop a Wheels to Work initiative in which local nonprofit organizations provide automobiles for Choices individuals who have obtained employment but are unable to accept or retain the employment solely because of a lack of transportation.

(b) A Board may, through local policies and procedures, establish services to assist Choices individuals who verify the need for an automobile to accept or retain employment by referring them to available providers.

(c) Persons or organizations donating automobiles under a Wheels to Work initiative shall receive a charitable donation receipt for federal income tax purposes.

§811.66. Certificate of General Equivalence (GED) Testing Payments.

A Board shall ensure that the cost of certificate of GED testing and issuance of the certificate is paid through direct payments to the GED test centers and the Texas Education Agency for Choices individuals referred for testing by a Board's provider of Choices services.

§811.67. Individual Development Accounts (IDAs).

(a) A Board may set local policy and procedures to provide for implementation and oversight of IDAs under this section using TANF funds in accordance with 45 C.F.R. §§263.20-263.23. An IDA means an account established by, or for, an eligible individual to allow the individual to accumulate funds for specific purposes.

(b) A Board shall ensure that any IDAs created and matched with TANF funds are established and administered through a contract with a private nonprofit entity or through a state or local government entity acting in cooperation with a private nonprofit entity. The private nonprofit entity, or cooperating state or local entity, must coordinate with a financial institution in administering the accounts.

(c) Choices individuals may be eligible for IDAs if all of the requirements of this section are met.

(d) IDAs may be established for an eligible individual, and may be contributed to with the individual's earned income and up to fifty percent of the individual's federal Earned Income Tax Credit refund. Federal Earned Income Tax Credit refunds shall not be matched with TANF funds.

(e) Federal TANF funds, as well as public or private funds, may be used to provide matching funds for qualified expenses and to administer IDAs, and shall be expended in a manner consistent with applicable federal and state statutes and regulations, with the exception of federal Earned Income Tax Credit refunds.

(f) Use of funds in an individual's IDA, shall be in accordance with the Social Security Act §404(h) (42 U.S.C.A. §604(h)) and 45 C.F.R. §§263.20-263.23 and limited to expenses related to:

(1) postsecondary educational expenses;

(2) first home purchase; or

(3) business capitalization.

(g) A Board shall ensure that only qualified withdrawals are made by eligible individuals, and must develop policies and procedures to address unauthorized withdrawals, to include notification:

(1) to the individual that unauthorized withdrawals may impact the individual's eligibility for public assistance programs;

(2) to the individual of forfeiture of the entitlement to the matching funds for an unauthorized withdrawal; and

(3) to TDHS within seven working days of the unauthorized withdrawal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. APPEALS

40 TAC §§811.71 - 811.73

The new rules are proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The proposed new rules affect Human Resources Code Title 2, particularly Chapters 31, 34, and 44, Human Resources Code.

§811.71. Board Review.

(a) The following may request a review by the respective Board:

(1) a Choices individual against whom an adverse action is taken by a Texas Workforce Center Partner; or

(2) a person who believes that a Choices individual has displaced the person from employment.

(b) A request for review shall be submitted in writing and delivered to a Board within 15 calendar days of the date of the adverse action. The request shall also contain:

(1) a concise statement of the disputed adverse action;

(2) a recommended resolution; and

(3) any supporting documentation the Choices individual deems relevant to the dispute.

(c) On receipt of a request for review, a Board shall coordinate a review by appropriate Board staff.

(d) The parties to the request for review are the aggrieved person, applicant, or individual and the Texas Workforce Center Partner.

(e) Additional information may be requested from the parties. Such information shall be provided within 15 calendar days of the request.

(f) Within 30 calendar days of the date the request for review is received or of the date that additional requested information is received by the reviewing Board staff member, a Board shall send the parties written notification of the results of the review.

§811.72. Appeals to the Agency.

(a) After results of a review have been issued, the party that disagrees with the outcome of the review may request an Agency hearing to appeal the results of the review.

(b) The request for appeal to the Agency from a Board's review shall be filed in writing with the Appeals Department, Texas Workforce Commission, 101 East 15th Street, Room 410, Austin, Texas 78778-0001, within 15 calendar days after receiving written notification of the results of the review.

(c) The appeal to the Agency shall include a hearing, which is limited to the issues and the information considered in a Board review.

(d) The Agency hearing shall be held in accordance with the procedures applicable to an appeal as contained in Chapter 823 of this title (relating to General Hearings).

§811.73. Appeals to the Texas Department of Human Services (TDHS). A recipient who expresses dissatisfaction with a decision regarding the termination or reduction of his or her TANF cash assistance may appeal the decision to TDHS. If the termination or reduction of temporary cash assistance is based upon noncompliance with Choices requirements, a Board shall prepare and provide necessary information to TDHS.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304746
John Moore
General Counsel
Texas Workforce Commission
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-2573

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CHAPTER 815. UNEMPLOYMENT INSURANCE
SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

40 TAC §815.16

The Texas Workforce Commission (Commission) proposes an amendment to Chapter 815. Unemployment Insurance, Subchapter B. Benefits, Claims and Appeals, §815.16, Appeals to Appeal Tribunals from Determinations.

The purpose of the amendment is to modify the language that describes the procedures for conducting unemployment insurance hearings as provided by §212.106 of the Texas Labor Code. On June 20, 2003, Senate Bill 280 (SB 280), 78th Legislature, Regular Session, was signed into law. SB 280 included §7A.02 adding §212.106 to the Texas Labor Code. That section requires that "the Commission, by rule, shall develop procedures to ensure that an appeal tribunal make every effort in a hearing conducted by telephone conference under...[the Texas Unemployment Compensation Act] to obtain all relevant facts and evidence from the parties to the appeal." A rule amendment is proposed to §815.16(3)(A) of the Commission's current unemployment insurance rules to conform to this addition to the Texas Labor Code.

Background: The Commission has administrative rules governing the delivery of unemployment insurance benefits and the processing of unemployment insurance appeals. Section 815.15 defines who is a "Party of Interest" to an appeal. Section 815.16 addresses relevant aspects of the hearing procedure applicable to telephone hearings and the responsibilities of an appeal tribunal. Section 815.18 provides for general rules for both the Appeal Tribunal and Commission level of appeal. Section 815.19 provides guidance for the conduct of unemployment fraud hearings. Section 815.32 defines when an appeal will be considered timely.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect the following statements will apply:

there are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rule;

there are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule;

there are no estimated losses or increases in revenue to the state or local governments as a result of enforcing or administering the rule;

there are no foreseeable implications relating to costs or revenue to the state or local governments as a result of enforcing or administering the rule; and

there are no anticipated economic costs to persons required to comply with the rule.

Mr. Townsend, Chief Financial Officer, has determined that there is no adverse impact on small businesses as a result of enforcing or administering this rule because the requirement is directly required by statute.

LaSha Lenzy, Director, Unemployment Insurance and Regulation Division, has determined that for each year of the first five years that the rule will be in effect the public benefit anticipated as a result of the adoption of the rule amendment will be the assurance that parties in the hearings will be heard on matters relevant to the issues in the hearing.

James Barnes, Director, Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of this rule amendment.

Comments on the proposed section may be submitted to John Moore, General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax 512-463-2220; or e-mailed to john.moore@twc.state.tx.us. Comments must be received by the Commission no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

For information about the Commission please visit our web page at www.twc.state.tx.us.

The amendment is proposed under Texas Labor Code §301.061, which provides the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities and §212.106, which provides that the Commission by rule shall develop procedures to ensure that an appeal tribunal makes every effort in a hearing conducted by telephone conference under this subchapter to obtain all relevant facts and evidence from the parties to the appeal.

The amendment affects Title 2 and 4 Texas Labor Code.

§815.16. Appeals to Appeal Tribunals from Determinations.

A party of interest may appeal a determination to the appeal tribunal. Appeals shall be in accordance with the terms of this section, §815.15 of this chapter (relating to Parties with Appeal Rights), §815.17 of this chapter (relating to Appeals to the Commission from Decisions), and §815.18 of this chapter (relating to General Rules for Both Appeal stages). As used in this section and in §§815.17 and 815.18, the term "party" includes a person's or individual's representative. In this section, a reference to the term "supervisor of appeals" includes the supervisor's designee.

(1) Presentation of appealed claims.

(A) A party appealing from a determination made by an examiner under the provisions of the Act, shall file an appeal by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Agency in writing. A written appeal that is sent

to the Agency should be addressed to the Texas Workforce Commission, 101 East 15th Street, Austin, Texas, 78778-0001, or faxed to the number provided in the determination. A written appeal may be hand delivered to the Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001, a local office of the Agency, or an agent state, or a workforce center or an office of a Board. The appeal should identify the determination being appealed, the basis for the appeal, the name of the party appealing, and the date of the appeal. The provisions of §815.32 of this chapter (relating to Timeliness) shall determine on what date the appeal was filed.

(B) Upon the scheduling of a hearing on an appeal or a petition to reopen, notice of the hearing shall be mailed to the parties at least five days before the date of the hearing. The notice shall identify the decision or determination appealed from and shall specify the time and date of the hearing, the party appealing, and the issue to be heard. If the hearing is an in-person hearing, the notice shall also specify the location of the hearing.

(2) Disqualification of appeal tribunal. The essence of a fair hearing lies in the impartiality of the appeal tribunal. An appeal tribunal should be free not only of any personal interest or bias in the appeal before it, but also of any reasonable suspicion of personal interest. No appeal tribunal shall participate in the hearing of an appeal in which that tribunal has a personal interest in the outcome of the appeal decision. The appeal tribunal may withdraw from a hearing to avoid the appearance of impropriety or partiality. Challenges to the impartiality of any appeal tribunal may be heard and decided by the supervisor of appeals.

(3) Hearing of appeal.

(A) Consistent with §212.106 of the Texas Labor Code, all [~~All~~] hearings shall be conducted informally and in a manner to ensure the substantial rights of the parties. All issues relevant to the appeal shall be considered and ruled upon. The parties to an appeal before an appeal tribunal may present evidence that may be material and relevant as determined by an appeal tribunal. The appeal tribunal shall examine parties and witnesses, if any, and may allow cross-examination to the extent the appeal tribunal deems necessary to afford the parties due process. The appeal tribunal, with or without notice to any of the parties, may take additional evidence and shall seek to obtain all facts and evidence from the parties relevant to the hearing that it deems necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

(B) The parties to an appeal, with the consent of the appeal tribunal, may stipulate in writing the facts involved. The appeal tribunal may decide the appeal on the basis of a stipulation or, in its discretion, may set the appeal for hearing and take any additional evidence it deems necessary to enable it to determine the appeal.

(C) Hearings shall be conducted by telephone conference call unless the supervisor of appeals determines that an in-person hearing is necessary because a party with a physical impairment cannot effectively participate by telephone, because the nature of the evidence to be presented makes a hearing by telephone impractical, or because the supervisor of appeals otherwise determines that an in-person hearing is necessary. The rules and procedures in this chapter govern both in-person and telephone hearings. A party may request an in-person hearing by informally contacting, orally or in writing or by any other reasonable method of communication, the appeal tribunal or the supervisor of appeals before the scheduled time of the hearing and presenting information to support the request. The supervisor of appeals has the discretion to determine whether the party's request for an in-person hearing will be granted.

(4) Adjournment, continuance, and postponement of hearing.

(A) The appeal tribunal shall use its best judgment to determine when to grant a continuance or postponement of a hearing in order to secure all the evidence that is necessary and to be fair to the parties.

(B) Either prior to or during a hearing, an appeal tribunal, on its own motion or on the motion of a party of interest, may continue, adjourn, or postpone a hearing. The continuance, adjournment, or postponement shall not be for the purpose of delaying the proceeding and may be granted due to illness of the appellant, death in the immediate family of the appellant, or a pending criminal prosecution of the appellant. A continuance, adjournment or postponement may also be granted at the request of the appellant or appellee when there is a need for an interpreter, religious observance, jury duty, court appearance, active military duty, or other reasons approved by the supervisor of appeals. Prior to the hearing, requests for a continuance or a postponement of a hearing may be made informally, either orally or in writing, to the appeal tribunal designated to hear the appeal or to the supervisor of appeals.

(5) Reopening of hearing before appeal tribunal.

(A) If a party fails to appear for a hearing, the appeal tribunal may hear and record the evidence of the party present and the witnesses, if any, and shall proceed to decide the appeal on the basis of the record unless there appears to be good reason for continuing the hearing. A copy of the decision shall be promptly mailed to the parties of interest with an explanation of the manner in which, and time within which a request for reopening may be submitted.

(B) A party of interest to the appeal who fails to appear at a hearing may, within 14 days from the date the decision is mailed, petition for a new hearing before the appeal tribunal in the manner set out in subsection (1)(A) of this section. The petition should identify the party requesting the reopening, the applicable decision of the appeal tribunal, the date of the petition, and explain the reason for the failure to appear. The provisions of §815.32 of this chapter (relating to Timeliness) shall determine on what date the petition was filed. The petition shall be granted if it appears to the appeal tribunal that the petitioner has shown good cause for the petitioner's failure to appear at the hearing. In the event that an appeal to the Commission is filed before the filing of the petition for reopening by the appeal tribunal, the appeal shall be referred to the Commission for review.

(C) For purposes of this section, the term "appear" shall mean participation by a party or a party's representative in the proceeding. Actions that may be considered as participation include offering testimony, examining witnesses, or presenting oral argument. If the hearing is a telephone hearing, a party or a party's representative shall appear at a hearing by calling on the date and at the time of the hearing and participating in the hearing proceedings. If the hearing is an in-person hearing, a party or a party's representative shall appear by being at the location of the hearing on the date and at the time scheduled for the hearing and participating in the hearing proceedings. Mere submission of written documents, whether sworn or unsworn, or observation of the proceedings shall not constitute an appearance.

(6) The determination of appeals.

(A) As soon as possible following the conclusion of a hearing of an appeal, the appeal tribunal shall issue its findings of fact and decision with respect to the appeal. The decision shall be in writing and shall reflect the name of the appeal tribunal who conducted the hearing and who rendered the decision. In the decision, the appeal

tribunal shall set forth findings of fact and conclusions of law, with respect to the matters on appeal, and the reasons for the decision. Copies of the decision shall be mailed by the appeal tribunal to the parties of interest to the appeal. Upon request, courtesy copies may be mailed to other parties to the appeal.

(B) At any time during the 14-day period from the date a decision on an appeal is mailed, unless a party of interest has already appealed to the Commission, the appeal tribunal or the supervisor of appeals may assume continuing jurisdiction over the appeal for the purpose of reconsidering the issues on appeal and issuing a corrected decision. During the period in which continuing jurisdiction is assumed, the appeal tribunal, after notice to the parties, may take any additional evidence or secure any additional information it deems necessary to issue a decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304752
John Moore
General Counsel
Texas Workforce Commission
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-2573

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SUBCHAPTER C. TAX PROVISIONS

40 TAC §815.119

The Texas Workforce Commission (Commission) proposes new §815.119, Processing of Voluntary Contributions to Chapter 815, Unemployment Insurance, Subchapter C. Tax Provisions.

Section 204.048 Labor Code, titled Voluntary Contributions, states the conditions under which an employer may repay TWC for benefits charged to their TWC tax account during the period used to calculate the Unemployment Experience Tax Rate for the following year. Unemployment Benefit Chargebacks repaid under the Voluntary Contribution program are not used in calculation of the Employer's Annual Experience Tax Rate.

The 78th Session of the Texas Legislature amended §204.048, Labor Code, requiring that contributions made by employers under that section be due as prescribed by TWC Rule. Prior to that amendment the statute prescribed the due date and TWC had no authority to extend the due date when circumstances warranted.

This prescribed rule states the conditions to be met by TWC and the employer when participating in the Voluntary Contribution Program.

Randy Townsend, Chief Financial Officer, has determined that for the first five years the rule is in effect, the following statements will apply:

There are no additional estimated costs to the state or to local governments expected as a result of enforcing or administering the rule;

There are no estimated reductions in costs to the state or to local governments expected as a result of enforcing or administering the rule;

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule;

There are no foreseeable implications relating to costs or revenues to the state or to local governments as a result of enforcing or administering the rule;

Mr. Townsend, Chief Financial Officer, has determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering this rule because the requirement is directly required by statute.

LaSha Lenzy, Director, Unemployment Insurance and Regulation Division, has determined that for each year of the first five years that the rule will be in effect the public benefit anticipated as a result of the adoption of the proposed rule will be the increased participation in the Voluntary Contribution Program.

James Barnes, Director, Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of this proposed rule.

Comments on the proposed section may be submitted to John Moore, General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; Fax Number 512-463-2220; or e-mailed to john.moore@twc.state.tx.us. Comments must be received by the Agency no later than thirty (30) days from the date this proposal is published in the *Texas Register*.

For more information about the Commission and available services, see www.texasworkforce.org.

The new rule is proposed under Texas Labor Code §301.061 and §204.048, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Agency services and activities.

The proposed new rule affects Texas Labor Code, Title 4.

§815.119. Payment of Voluntary Contributions.

Texas Labor Code, §204.048(a), provides that an employer that is eligible for an annual Experience Rate calculation under §204.041, Labor Code, may elect to make a voluntary payment of contributions to the agency.

(1) The agency will notify employers eligible for an annual rate calculation under §204.041, Labor Code, of the experience tax rate for the following year and the amount of charges that were used in calculating that rate.

(2) Voluntary contribution shall be due not later than the 60th day after the date on which the commission mails the employer's annual tax rate notice. When the last day for payment of voluntary contributions falls on a Saturday, Sunday, or a legal holiday on which the agency office is closed, the payment may be made on the next regular business day.

(3) The agency may extend the due date for the payment of voluntary contributions; however, the extension may not exceed 75 days from the date on which the commission mails the employer's annual rate notice. In no situation may the extension exceed the date imposed by the deadline in §204.048(e), Labor Code.

(4) If the voluntary contribution payment is insufficient to cause a decrease in the tax rate, the agency will notify the employer and grant an extension, not to exceed 75 days from the date on which the commission mails the employer's annual tax rate notice to remit additional voluntary contributions, subject to the limitations imposed by §204.048(e), Labor Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304753

John Moore
General Counsel
Texas Workforce Commission
Earliest possible date of adoption: September 21, 2003
For further information, please call: (512) 463-2573

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 8. PIPELINE SAFETY REGULATIONS

SUBCHAPTER B. REQUIREMENTS FOR NATURAL GAS AND HAZARDOUS LIQUIDS PIPELINES

16 TAC §8.103

The Railroad Commission of Texas has withdrawn from consideration the proposed amendments to §8.103 which appeared in the March 28, 2003, issue of the *Texas Register* (28 TexReg 2679).

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304758
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date:August 5, 2003
For further information, please call: (512) 475–1295

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 98. HIV AND STD PREVENTION

SUBCHAPTER C. TEXAS HIV MEDICATION PROGRAM

DIVISION 1. GENERAL PROVISIONS

25 TAC §98.116

The Texas Department of Health has withdrawn from consideration the proposed new §98.116 which appeared in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4041).

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304927
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 8, 2003
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 411. STATE AUTHORITY RESPONSIBILITIES

SUBCHAPTER I. TDMHMR IN-HOME AND FAMILY SUPPORT PROGRAM

25 TAC §411.403

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration the proposed repeal to §411.403 which appeared in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5061).

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304836
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 7, 2003
For further information, please call: (512) 206-4516

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25 TAC §411.403

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration the proposed new to §411.403 which appeared in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5061).

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304835
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 7, 2003
For further information, please call: (512) 206-4516

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25 TAC §§411.406, 411.407, 411.411

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration the proposed amendments to §§411.406, 411,407, 411.411 which appeared in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5061).

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304837

Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 7, 2003
For further information, please call: (512) 206-4516

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION
SUBCHAPTER H. CRIME STOPPERS PROGRAM CERTIFICATION
DIVISION 1. CRIME STOPPERS PROGRAM CERTIFICATION

The Crime Stoppers Advisory Council ("Council") adopts the amendment of Subchapter H §3.9000; the addition of Subchapter H §§ 3.9005, 3.9010, and 3.9015; and the repeal of Subchapter H §3.9100 and §3.9200, without changes to the proposed text as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4695).

The proposed amendments and additions provide processes and procedures for the certification, decertification, and review of crime stoppers organizations, and the requirements for the submission of annual probation fee and repayment reports.

The adopted amendment to §3.9000 clarifies the requirements that a crime stoppers organization must fulfill to be certified by the Council to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Article 42.12 of the Texas Code of Criminal Procedure. The authority to determine if a crime stoppers organization is qualified to receive such repayments and payments is granted to the Council by Texas Government Code, §414.011(a). The proposed amendment also clarifies the processes and procedures for certification, and permits the Council to extend the certification period for limited periods of time under specified circumstances.

The adopted addition of §3.9005 establishes processes and procedures for deciding if a crime stoppers organization should be decertified during the certification period. The authority to determine if a crime stoppers organization should be decertified because the organization no longer meets the certification requirements is granted to the Council by Texas Government Code, §414.011(d).

The adopted addition of §3.9010 requires a certified crime stoppers organization to submit an Annual Probation Fee and Repayment Report postmarked no later than January 31 of each year. The proposed addition implements the requirements set forth in Texas Government Code, §414.010(a).

The adopted addition of §3.9015 establishes processes and procedures for the review of certified crime stoppers organizations. The authority to direct the review of certified crime stoppers organizations is granted to the Criminal Justice Division ("CJD") of the Office of the Governor by Texas Government Code, §414.011(b).

The adopted repeal of §3.9100, entitled "Certification", and §3.9200, entitled "Decertification", allows these section numbers to be available if further expansion of the administrative code becomes necessary. The provisions regarding certification are found in §3.9000 and the provisions regarding decertification are found in §3.9005.

No comments were received regarding the amendments, additions, and repeals of these rules.

1 TAC §§3.9000, 3.9005, 3.9010, 3.9015

The amendment of §3.9000, and the addition of §3.9005 and §3.9010, are adopted under the Texas Government Code, Title 4, §414.006, which provides the Council the authority to adopt rules to carry out its functions.

The amendment of §3.9000 implements the Texas Government Code, Title 4, §414.011(a), which requires the Council to certify qualified crime stoppers organizations to receive payments and reward repayments. The addition of §3.9005 implements the Texas Government Code, Title 4, §414.011(d), which authorizes the Council to decertify a crime stoppers organization if it determines that the organization no longer meets the certification requirements. The addition of §3.9010 implements the Texas Government Code, Title 4, §414.010(a), which requires certified crime stoppers organizations to file a detailed report with the Council not later than January 31 of each year.

The addition of §3.9015 is adopted under the Texas Government Code, Title 4, §414.011(c), which authorizes CJD or its designee to draft rules for adoption by the Council relating to the review or audit of certified crime stoppers organizations.

The addition of §3.9015 implements the Texas Government Code, Title 4, §414.011(b), which subjects certified crime stoppers organizations to review or audit of their finances or programs at the direction of CJD or its designee.

No other statutes, articles, or codes are affected by the amendment and addition of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2003.

TRD-200304784

David Zimmerman
Assistant General Counsel
Office of the Governor
Effective date: August 26, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-1919

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1 TAC §3.9100, §3.9200

The repeal of these rules is adopted under the Texas Government Code, Title 4, §414.006, which provides the Council the authority to adopt rules to carry out its functions.

The repeal of §3.9100 implements the Texas Government Code, Title 4, §414.011(a), which requires the Council to certify qualified crime stoppers organizations to receive payments and reward repayments. The repeal of §3.9200 implements the Texas Government Code, Title 4, §414.011(d), which authorizes the Council to decertify a crime stoppers organization if it determines that the organization no longer meets the certification requirements.

No other statutes, articles, or codes are affected by the repeal of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2003.

TRD-200304785
David Zimmerman
General Counsel
Office of the Governor
Effective date: August 26, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-1919

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 5. FUEL QUALITY

4 TAC §5.6

The Texas Department of Agriculture (the department) adopts amendments to Chapter 5, Fuel Quality, §5.6, without changes to the proposed text, as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4767). The amendments to §5.6 are adopted to increase the fees collected for the purpose of enforcing and administering the department's motor fuel testing program. The increase in fees will ensure that costs to state government associated with the motor fuel testing program are recovered as directed by the 78th Legislature, Regular Session, 2003. The amendments increase the fee per liquid measuring device used to deliver one gasoline product per nozzle from $2.10 to $2.50 and increases the fee per device used to deliver multiple gasoline products per nozzle from $6.25 to $7.50.

Comments on the proposal were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees have not been increased for a number of years, while costs to the state as a whole to implement programs has continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §5.6 are adopted under Article 8614, Vernon's Texas Civil Statutes, §9, which provides the department with authority to adopt rules necessary for the regulation of the sale of motor fuels and to impose a fee for testing, inspection or performance of other services necessary for administration of Article 8614.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304964
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 463-4075

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CHAPTER 12. WEIGHTS AND MEASURES

SUBCHAPTER B. DEVICES

4 TAC §12.12

The Texas Department of Agriculture (the department) adopts amendments to Chapter 12, Weights and Measures, Subchapter B, Devices, §12.12, without changes to the proposed text, as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4767). The amendments to §12.12 are adopted to increase the fees charged to register weights and measures devices with the department. The increase in fees will allow the department to recover its costs associated with the administration of the department's weights and measures regulatory activities as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendments increase by 20% the registration fees for each weights and measures device registered with the department.

Comments on the proposal were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §12.12 are adopted under the Texas Agriculture Code (the code), §13.002, which provides the department with authority to adopt rules necessary for the enforcement and administration of the department's Weights and Measures Program; and §13.1151, which provides the department with the authority to set by rule and charge a fee for the registration of a pump, scale, bulk or liquefied petroleum gas metering device required under §13.1011 of the code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

SUBCHAPTER D. METROLOGY

4 TAC §12.30

The Texas Department of Agriculture (the department) adopts amendments to Chapter 12, Weights and Measures, Subchapter D. Metrology, §12.30, concerning fees charged for metrology services, without changes to the proposal published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4767). The amendments are adopted to increase fees charged for metrology services in order to recover costs of administration of the departments metrology program, in accordance with Texas Agriculture Code, 12.0144, and the directive of the 78th Legislature, Session, 2003.

The amendments increase precision testing fees as follows: from $25 per weight to $40 per weight for weights up to and including 3 kilograms, from $50 per weight to $80 per weight for weights more than 3 kilograms, up to and including 30 kilograms, from $70 per weight to $100 per weight for weights more than 30 kilograms; and tolerance testing fees as follows: from $5 per weight to $10 per weight for weights less than 10 pounds, from $10 per weight to $20 per weight for weights 10 pounds or more but less than 500 pounds, from $20 per weight to $40 per weight for weights 500 pounds or more but less than 2,500 pounds, from $40 per weight to $80 per weight for weights 2,500 pounds or more; and volume measure testing fees as follows: from $20 per measure to $40 per measure for liquid measures 5 gallons or less, from $20 plus $.50 for each gallon over 5 gallons to $40 plus $.50 for each gallon over 5 gallons for liquid measures more than 5 gallons, from $25 to $100 for liquefied petroleum gas (LPG) provers 25 gallons or less, from $100 to $250 for liquefied petroleum gas (LPG) provers over 25 gallons. The amendments also increase fees for testing increments from $25 per increment to $50 per increment.

The department received comments from the Texas Farm Bureau (TFB) opposing the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all

agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §12.30 are adopted under the Texas Agriculture Code (the Code), §13.002 which provides the department with the authority to adopt rules necessary for the enforcement and administration of the department's Weights and Measures program; and the Code, §13.115(c) and 13.115(d), which provide the department with the authority to set and charge a fee for the testing of a weight or measure by the department's metrology laboratory.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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SUBCHAPTER E. LICENSED SERVICE COMPANIES

4 TAC §12.43

The Texas Department of Agriculture (the department) adopts amendments to Chapter 12, Weights and Measures, Subchapter E, Licensed Service Companies, §12.43, without changes to the proposed text, as published in the June 27, 2003 issue of the *Texas Register*(28 TexReg 4765). The amendments to §12.43 are adopted to increase the fees charged to license a weights and measures service company with the department. The increase in fees will allow the department to recover its costs associated with the administration of the department's weights and measures regulatory activities as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendment increases the fee for licensed service companies from $75 to $90.

Comments on the proposal were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §12.43 are adopted under the Texas Agriculture Code (the code), §13.002, which provides the department with the authority to adopt rules as necessary for the enforcement and administration of the department's Weights and Measures Program; and the code, §13.1012, which authorizes the department to set by rule and collect a registration fee for persons servicing weighing and measuring devices.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
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Texas Department of Agriculture
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For further information, please call: (512) 463-8170

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SUBCHAPTER F. LICENSED INSPECTION COMPANIES

4 TAC §12.53

The Texas Department of Agriculture (the department) adopts amendments to Chapter 12, Weights and Measures, Subchapter F, Licensed Inspection Companies, §12.53, without changes to the proposed text, as published in the June 27, 2003 issue to the *Texas Register* (28 TexReg 4765). The amendments to §12.53 are adopted to increase the fees charged to register a weights and measures inspection company with the department and to increase the maximum amount that licensed inspection companies can charge for LPG meter and ranch scale inspections, as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendments increase the fee licensed inspection companies may charge for inspections from $150 to $250, and the registration fee for such companies from $75 to $90.

Comments were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §12.53 are adopted under the Texas Agriculture Code (the code), §13.002, which provides the department with the authority to adopt rules as necessary for the enforcement and administration of the department's Weights and Measures Program; and the code §13.403, which authorizes the department to establish by rule an annual license fee for licensed inspectors of weighing and measuring devices.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
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SUBCHAPTER G. REGISTERED TECHNICIANS

12 TAC §12.60

The Texas Department of Agriculture (the department) adopts amendments to Chapter 12, Weights and Measures, Subchapter G, Registered Technicians, §12.60, without changes to the proposed text, as published in the June 27, 2003 issue of the *Texas Register* (28 TexReg 4767). The amendments to §12.60 are adopted to increase the examination fee charged for each exam administered. The increase in fees will allow the department to recover its costs associated with the administration of the department's weights and measures regulatory activities as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendment increases the examination fee for registered technicians from $50 to $60.

Comments were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear

is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §12.60 are adopted under the Texas Agriculture Code (the code), §13.002, which provides the department with the authority to adopt rules as necessary for the for enforcement and administration of the department's Weights and Measures Program; and the code, §13.1012, which authorizes the department to set by rule and collect a registration fee for persons servicing weights and measures devices.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
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For further information, please call: (512) 463-4075

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SUBCHAPTER H. PUBLIC WEIGHERS

4 TAC §12.73

The Texas Department of Agriculture (the department) adopts amendments to Chapter 12, Weights and Measures, Subchapter H, Public Weighers, §12.73, without changes to the proposed text, as published in the June 27, 2003 issue of the *Texas Register* (28 TexReg 4766). The amendments to §12.73 are adopted to increase the fees charged to license a public weigher with the department. The increase in fees will allow the department to recover its costs associated with the administration of the department's weights and measures regulatory activities as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendments increases the fee for a county or deputy public weigher from $100 to $120 and increase the fee for a state public weigher from $400 to $480.

Comments were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The department received comments from the Texas Farm Bureau (TFB) opposing the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §12.73 are adopted under the Texas Agriculture Code (the code), §13.002, which provides the department with the authority to adopt rules as necessary for the enforcement and administration of the department's Weights and Measures Program; and the code, §13.255, which authorizes the department to set by rule and collect a nonrefundable fee for issuing a certificate of authority for a County or Deputy public weigher.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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CHAPTER 14. PERISHABLE COMMODITIES HANDLING AND MARKETING PROGRAM
SUBCHAPTER A. GENERAL PROVISIONS

4 TAC §14.3

The Texas Department of Agriculture (the department) adopts amendments to Chapter 14, §14.3, concerning fees charged to

licensed businesses who handle Texas grown perishable commodities for resale, without changes to the proposed text as published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5014). The amendments to §14.3 are adopted to increase the fees charged to licensed companies handling Texas grown perishable commodities. The increase in fees will allow the department to recover costs associated with the administration of the department's handling and marketing of perishable commodities regulatory activities as required by the Texas Agriculture Code, §12.0144, and directed by the 78th Legislature, Regular Session, 2003. The amendments increase the fee for each buying agent or transporting agent identification card from $1.00 to $10, increase the fee for each cash dealer from $25 to $30, and increase the fee for each general license registered with the department from $75 to $90.

No public comments were received regarding the proposal.

The amendments to §14.3 are adopted under the Texas Agriculture Code, §101.006, which provides the Texas Department of Agriculture with the authority to set by rule and charge a fee for a cash dealer registration, a general license and a buying and/or transporting agent identification card.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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CHAPTER 15. EGG LAW

4 TAC §15.4

The Texas Department of Agriculture (the department) adopts amendments to Chapter 15, Egg Law, §15.4, without changes to the proposed text, as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4767). The amendments to §15.4 are adopted to increase the license fees for an egg dealer/wholesaler, processor, or broker. The increase in fees will allow the department to recover its costs associated with the administration of the department's egg law regulatory activities as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendments increase fees for dealer/wholesaler class 1, 2, 3, 4 and processor class 1 and 2 licenses by 33% and increase dealer/wholesaler classes 5-12, processor class 3 and 4 and broker.

Comments were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The department received comments from the Texas Farm Bureau (TFB) opposing the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees had not been increased for a number of years, including the fees for egg licenses, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §15.4 are adopted under the Texas Agriculture Code (the code), §132.003, which provides the department with the authority to adopt rules as necessary for the for administration of the code, chapter 132; and the code §132.026 which authorizes the department to set by rule a fee for an egg dealer-wholesaler license, and the code, §132.028, which authorizes the department to set by rule and charge a fee for an egg brokers license.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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CHAPTER 16. AQUACULTURE

4 TAC §16.3

The Texas Department of Agriculture (the department) adopts amendments to Chapter 16, Aquaculture, §16.3 without changes to the proposed text, as published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4767). The amendments to §16.3

are adopted to increase the fees charged to license an aquaculture facility or a fish farm vehicle. The increase in fees will allow the department to recover its costs associated with the administration of the department's aquaculture regulatory activities as required by the Texas Agriculture Code, §12.0144 and directed by the 78th Legislature, Regular Session, 2003. The amendment increases the aquaculture license fee from $100 to $120.

Comments were received from the Texas Farm Bureau (TFB) in opposition to the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees have not been increased for a number of years, while costs to the state as a whole to implement programs has continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments are adopted under the Texas Agriculture Code (the code), §134.005, which provides the department with the authority to adopt rules as necessary for carrying out the department's duties under the code, chapter 134; and the code §134.014, which authorizes the department to set and charge a fee for an aquaculture license or a fish farm vehicle license.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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CHAPTER 17. MARKETING AND PROMOTION DIVISION

SUBCHAPTER B. LIVESTOCK EXPORT FACILITIES

4 TAC §17.31

The Texas Department of Agriculture (the department) adopts amendments to §17.31, concerning operation of livestock export facilities, without changes to the proposal published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5014). The amendments are adopted to increase the current livestock export facility fees in order to allow the department to recover more of its costs of implementing its livestock export pen program, as directed by the 78th Legislature, 2003. The increase in fees will allow the department to maintain and make necessary repairs to these facilities. In addition, the increase in fees will allow cost recovery for fee expenses to state government from users. Except as noted, the amendments to §17.31 increase by 100% the fees paid for necessary water, pen space, and necessary labor for feeding of livestock and assisting in conducting of inspections requested at the livestock export pens operated by the department. The fees for slaughter sheep and goats has been increased from $.25 to $1.00 per head. The fees for horses at the Houston livestock facility have been increased from $10 to $30 per head, and the fee for exotics at the Houston facility is increased from $2.50 to $10 per head. The fees for poultry, other than baby chicks or fertile eggs, have not been increased.

In addition to the fee increases noted above, Subsection (k) of §17.31 is amended to formalize the department's current policy of not accepting cash payments for services. New subsection 17.31(l) is added to establish a fee for animals other than sheep, goats, horses, mules, cattle, hogs, poultry, or exotic livestock or fowl. In past fees for these animals were established on a case-by-case basis. The amendment establishes a consistent fee for these animals for pen facilities on the Texas-Mexico border.

No comments were received on the proposal.

The amendments to §17.31 are adopted under the Texas Agriculture Code (the Code), §146.021, which provides the department with the authority to establish and collect reasonable fees for yardage, maintenance, feed, medical care, and other necessary expenses incurred by the department in the course of processing those animals; and the Code, §12.016, which provides the department with the authority to adopt rules as necessary to administer its duties under the Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Deputy General Counsel
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For further information, please call: (512) 463-4075

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CHAPTER 19. QUARANTINES
SUBCHAPTER A. GENERAL QUARANTINE PROVISIONS

4 TAC §19.3

The Texas Department of Agriculture (the department) adopts amendments to §19.3, concerning the inspection fee for the issuance of a phytosanitary certificate, without changes to the proposal published in the June 20, 2003, issue of *Texas Register* (28 TexReg 4619). The amendments to §19.3 are adopted to increase the fee for a phytosanitary growing season inspection and state phytosanitary inspection and certification, as directed by the 78th Legislature, Regular Session, 2003, and to establish an inspection fee for issuance of a federal phytosanitary certificate. A phytosanitary inspection certificate is issued if an article is inspected and is found free of pest infestation. The department issues three types of phytosanitary certificates; a phytosanitary growing season inspection certificate, a state phytosanitary certificate, and a federal phytosanitary certificate. A phytosanitary growing season inspection certificate is issued for the inspection of field crops for export. A state phytosanitary certificate is issued for the export of agricultural commodities to other states, while a federal phytosanitary certificate is issued for the export of agricultural commodities to other countries. A federal phytosanitary certificate is issued under the authority of the U.S. Plant Protection Act of 1999 through a cooperative agreement with United States Department of Agriculture. The fee for an inspection to issue a phytosanitary growing season inspection certificate or a state phytosanitary certificate has not increased since 1996. The amendments increase the fee for a phytosanitary growing season inspection and state phytosanitary inspection and certification from $25 to $30, and establish an inspection fee of $50 for issuance of a federal phytosanitary certificate.

The department received comments from the Texas Farm Bureau (TFB) opposing the proposed fee increases. The TFB, through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees, such as fees assessed by the department for state phytosanitary inspection and certification, had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §19.3 are adopted under the Texas Agriculture Code, §12.021, which authorizes the department to collect an inspection fee for a phytosanitary inspection required by other states and foreign countries for agricultural products, processed products, or equipment exported from this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304922
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 20, 2003
For further information, please call: (512) 463-4075

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CHAPTER 22. NURSERY PRODUCTS AND FLORAL ITEMS

4 TAC §22.3

The Texas Department of Agriculture (the department) adopts amendments to §22.3, concerning nursery/floral registration classification and renewal fees, without changes to the proposal published in the June 20, 2003, issue of *Texas Register* (28 TexReg 4620). The amendments to §22.3 are adopted to increase the registration and renewal fees charged for the Nursery/Floral Registration Classes 1, 2, 3, 4 and M, as required by the Texas Agriculture Code, §12.0145 and directed by the 78th Legislature, Regular Session, 2003. There have been no fee changes to registration classes 1-4 since 1976. Class M was added as a registration class in 1996, with a registration fee of $150, to facilitate the nursery and floral operations at mobile locations, and that fee has not changed since 1996. The amendments increase fees for nursery/floral registration and renewal to $75 for Class 1, $110 for Class 2, $145 for Class 3, $180 for Class 4 and $180 for Class M.

The department received comments from the Texas Farm Bureau (TFB) opposing the proposed fee increases. The TFB,

through its president, Kenneth Dierschke, commented that it supports and appreciates the department's functions and services, but that it feels the increased fees are not appropriate and do not reflect the instructions of the state leadership not to raise taxes. The TFB further stated its belief that fees collected by the department should be used to fund the services provided to the segment of the population paying the fees and not to fund services to the general public, and that agency services should be funded by general revenue.

The department appreciates the TFB's support of the department's functions and services, and is understanding of the TFB's concern over the affect of fee increases on its members. However, the department was directed by the Legislature to increase its fees in order to recover direct and indirect costs to state government to implement state programs. Due to the large budget shortfall, during the course of the appropriations process all agencies were asked to do their part to contribute toward eliminating the budget shortfall, including cutting agency costs and raising agency fees. Moreover, in reviewing revenue generated by agency fees, the department discovered that some agency fees, such as fees assessed by the department for nursery and floral facility registration, had not been increased for a number of years, while costs to the state as a whole to implement programs have continued to increase.

The department does agree with the TFB that services should be funded by the General Revenue Fund. What may not be clear is that the department's regulatory programs are not funded directly by fees, but by general revenue. All but a small percentage of fee revenue collected by the department and other state agencies goes into the General Revenue Fund and from that fund is then appropriated to agencies to cover their costs. Also, while the TFB is correct that the state leadership, including the Governor and the Legislature, were clear in their instruction not to raise taxes, the TFB is not correct in viewing license and permit fees as taxes. Such fees, by definition, are not taxes and have often been used as vehicles for the generation of state revenue, as was the case in the 78th legislative session.

The amendments to §22.3 are adopted under the Texas Agriculture Code, §71.043, which provides the department with the authority to set and collect an annual registration fee for registration of nursery or floral business.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304923
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 1, 2003
Proposal publication date: June 20, 2003
For further information, please call: (512) 463-4075

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 15. ADMINISTRATION OF FEDERAL PROGRAMS

13 TAC §15.6

The Texas Historical Commission adopts amendments to §15.6 to update its Certified Local Government state procedures of Title 13, Part 2, Chapter 15 of the Texas Administrative Code with no changes made to the proposed text as published in the April 25, 2003, issue of the *Texas Register* (28 TexReg 3439).

Minor changes are needed to meet National Park Service requirements for the state Certified Local Government program in order to reflect various changes in the National Historic Preservation Act, in 36 CFR 61, and in the *Historic Preservation Fund Grants Manual*.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Government Code, §442.005(q) which authorizes the Texas Historical Commission to "adopt rules as it considers proper for the effective administration of this chapter." The amendments are also adopted under Texas Government Code, §442.005(t) which authorizes the Texas Historical Commission to "promote heritage tourism by assisting persons, including local governments, organizations, and individuals, in the preservation, enhancement, and promotion of heritage and cultural attractions in this state..."

Texas Government Code §442.005(t) is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304888
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: August 28, 2003
Proposal publication date: April 25, 2003
For further information, please call: (512) 936-4323

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CHAPTER 21. LOCAL HISTORY PROGRAMS

The Texas Historical Commission (THC) adopts the repeal of §§21.1-21.31, concerning the Museum Services, Official Texas Historical Marker, Historic Texas Cemetery and Awards programs, and adopts new §§21.1-21.3, 21.6-21.9, 21.12, 21.15 and 21.18 in its History Programs chapter. New §21.3 is adopted with changes to the proposed text as published in the June 6, 2003, issue of the *Texas Register* (28 TexReg 4383). New §§21.1, 21.2, 21.6-21.9, 21.12, 21.15 and 21.18 and the repeals of §§21.1-21.31 are adopted without changes and will not be republished.

The purpose of the repeals and new sections is to update and clarify the criteria for administering these programs to bring the rules in line with current procedures. The new sections change the age criteria for topics eligible for subject markers from 75 to 50 years; change the date an individual can be eligible for a marker or for mentioning in a marker inscription from 20 to 10

years after his or her death; allow the THC to adopt internal procedures for approval or rejection of marker applications; clarifies ownership of Official Texas Historical Markers by the State of Texas; and clarifies the scope of the museum services, cemetery preservation and awards programs.

No comments were received regarding adoption of the repeals and new sections.

13 TAC §§21.1 - 21.31

The repeals are adopted under the Government Code, Chapters 442.005 and 442.006, which authorizes THC to adopt rules to carry out its programs and to direct and coordinate the museum services, historical markers, Historic Texas Cemetery and Awards programs.

The repeals implement the Government Code, §442.005 and §442.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304939
F. Lawrence Oaks
Executive Director
Texas Historical Commission
Effective date: August 28, 2003
Proposal publication date: June 6, 2003
For further information, please call: (512) 936-4323

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CHAPTER 21. HISTORY PROGRAMS
SUBCHAPTER A. INTRODUCTION

13 TAC §§21.1 - 21.3

The new sections are adopted under the Government Code, Chapter 442, which authorizes THC to adopt rules to carry out its programs.

The new sections implement the Government Code, §442.005 and §442.006.

§21.3. Definitions.

When used in this chapter, the following words or terms have the following meanings unless the context indicates otherwise:

(1) Official Texas Historical Marker. Official Texas Historical Markers are those markers and plaques the Texas Historical Commission awards, approves or administers. They include centennial markers the State of Texas awarded in the 1930s; Civil War Centennial markers from the 1960s; and medallions and markers the commission's predecessor, the Texas State Historical Survey Committee, awarded.

(2) Historical marker application. Historical marker application means a current version of the commission's *Official Texas Historical Marker Application Form* and all required supporting documentation as required in §21.7 of this chapter (relating to Application Requirements).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304940
F. Lawrence Oaks
Executive Director
Texas Historical Commission
Effective date: August 28, 2003
Proposal publication date: June 6, 2003
For further information, please call: (512) 936-4323

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SUBCHAPTER B. OFFICIAL TEXAS HISTORICAL MARKER PROGRAM

13 TAC §§21.6 - 21.9

The new sections are adopted under the Government Code, Chapter 442, which authorizes THC to adopt rules to carry out its programs.

The new sections implement the Government Code, §442.005 and §442.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304941
F. Lawrence Oaks
Executive Director
Texas Historical Commission
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Proposal publication date: June 6, 2003
For further information, please call: (512) 936-4323

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SUBCHAPTER C. HISTORIC TEXAS CEMETERY PROGRAM

13 TAC §21.12

The new section is adopted under the Government Code, Chapter 442, which authorizes THC to adopt rules to carry out its programs.

The new section implements the Government Code, §442.005 and §442.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304942
F. Lawrence Oaks
Executive Director
Texas Historical Commission
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Proposal publication date: June 6, 2003
For further information, please call: (512) 936-4323

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SUBCHAPTER D. MUSEUM SERVICES PROGRAM

13 TAC §21.15

The new section is adopted under the Government Code, Chapter 442, which authorizes THC to adopt rules to carry out its programs.

The new section implements the Government Code, §442.005 and §442.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304943
F. Lawrence Oaks
Executive Director
Texas Historical Commission
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Proposal publication date: June 6, 2003
For further information, please call: (512) 936-4323

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SUBCHAPTER E. AWARDS PROGRAM

13 TAC §21.18

The new section is adopted under the Government Code, Chapter 442, which authorizes THC to adopt rules to carry out its programs.

The new section implements the Government Code, §442.005 and §442.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

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F. Lawrence Oaks
Executive Director
Texas Historical Commission
Effective date: August 28, 2003
Proposal publication date: June 6, 2003
For further information, please call: (512) 936-4323

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

The Railroad Commission of Texas (Commission) adopts amendments to §§3.12, 3.13, and 3.30, relating to Directional Survey Company Report; Casing, Cementing, Drilling, and Completion Requirements; and Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ); the repeal of §§3.65, 3.66, 3.67, and 3.69, relating to Pipeline Permits Required; Pipeline Tariffs; Obtaining Pipeline Connections; and Definitions; new §§3.70 and 3.71, relating to Pipeline Permits Required; and Pipeline Tariffs; the repeal of §3.72, relating to Manifest To Accompany Each Transport of Liquid Hydrocarbons by Vehicle; new §3.72, relating to Obtaining Pipeline Connections; the repeal of §§3.75, and 3.77, relating to Discharges to Waters of the State; and Brine Mining Injection Wells; and new §§3.79, 3.81 and 3.85, relating to Definitions; Brine Mining Injection Wells; and Manifest to Accompany Each Transport of Liquid Hydrocarbons by Vehicle; and amendments to §§3.93, 3.99, and 3.100, relating to Water Quality Certification Definitions; Cathodic Protection Wells; and Seismic Holes and Core Holes. Sections 3.30, 3.81, and 3.85 are adopted with minor changes and the remaining sections are adopted without changes to the versions published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4771).

The Commission adopts these repeals, new sections, and amendments to update references to rule numbers or titles; update agencies' names; and repeal and renumber some rules so that the Texas Administrative Code section number matches the commonly-used Statewide Rule number. All of the changes are non-substantive and are made for clarification and accuracy. The amendment to §3.12 adds overnight mail as a delivery option. The amendments to §3.100 and the change in wording in new §3.79 (current §3.69) update the citations to the Commission's coal and uranium mining regulations. Sections 3.99(i) and 3.100(b) are deleted because they refer to a rule that has been repealed.

The adopted change in §3.30(f)(1)(B) makes the same change as was proposed in subsection (f)(1)(A) to delete the reference to the OPPR and to substitute the correct office name, Small Business and Environmental Assistance Division. The adopted change in §3.81(i)(5)(C) corrects a reference to the Texas Government Code. The adopted change in §3.85(g) corrects the title of §3.1.

The Commission also adopts the review of these rules pursuant to Texas Government Code, §2001.039, in a separate document filed simultaneously with the *Texas Register*. In addition to the repeals, new sections, and amendments in this document, the review also includes §§3.6, 3.16, 3.23, 3.27, 3.31, 3.34, 3.41, 3.54, 3.55, 3.62, 3.80, and 3.102, relating to Application for Multiple Completion; Log and Completion or Plugging Report; Vacuum Pumps; Gas To Be Measured and Surface Commingling of Gas; Gas Reservoirs and Gas Well Allowable; Gas To Be Produced and Purchased Ratably; Application for New Oil or Gas Field Designation and/or Allowable; Gas Reports Required; Reports on Gas Wells Commingling Liquid Hydrocarbons before Metering; Cycling Plant Control and Reports; Commission Forms, Applications and Filing Requirements; and Tax Reduction for Incremental Production.

The Commission received no comments on the proposal.

16 TAC §§3.12, 3.13, 3.30, 3.70 - 3.72, 3.79, 3.81, 3.85, 3.93, 3.99, 3.100

The Commission adopts the new sections and amendments pursuant to Texas Natural Resources Code, §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells and persons owning or operating pipelines in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction and pursuant to Texas Natural Resources Code §§85.042, 85.202, 86.041 and

86.042 which require the Commission to adopt rules to control waste of oil and gas.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 85.024, 85.202, 86.041, and 86.042.

Cross-reference to statute: Texas Natural Resources Code, §§81.051 and 81.052 and §§85.042, 85.202, 86.041 and 86.042.

Issued in Austin, Texas, on August 5, 2003.

§3.30. Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ).

(a) Need for agreement.

(1) Section 10 of House Bill 1407, 67th Legislature, 1981, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, provides as follows: On or before January 1, 1982, the Texas Department of Water Resources, the Texas Department of Health, and the Railroad Commission of Texas shall execute a memorandum of understanding that specifies in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas. The agencies shall amend the memorandum of understanding at any time that the agencies find it to be necessary.

(2) The original Memorandum of Understanding (MOU) between the agencies became effective January 1, 1982. The MOU was revised effective December 1, 1987, to reflect legislative clarification of the Railroad Commission's jurisdiction over oil and gas wastes and the Texas Water Commission's (successor to the Texas Department of Water Resources) jurisdiction over industrial and hazardous wastes.

(3) The agencies have determined that the revised MOU that became effective on December 1, 1987, should again be revised to further clarify jurisdictional boundaries and to reflect legislative changes in agency responsibility and the combination of the Texas Water Commission, the Texas Air Control Board, and portions of the Texas Department of Health to form the Texas Natural Resource Conservation Commission.

(b) General agency jurisdictions.

(1) Texas Commission on Environmental Quality (TCEQ) (the successor agency to the Texas Natural Resource Conservation Commission (TNRCC)). References in this section to TCEQ shall mean TCEQ or any successor agencies.

(A) The TCEQ has jurisdiction over solid waste under Chapter 361 of the Texas Health and Safety Code, §§361.001-361.754. The TCEQ's jurisdiction encompasses both hazardous and nonhazardous, industrial and municipal, solid wastes.

(B) Under Texas Health and Safety Code, §361.003(34), solid waste under the jurisdiction of the TCEQ is defined to include "garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities."

(C) Solid waste is further defined in Texas Health and Safety Code, §361.003(34), to exclude "material which results from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas pursuant to Section 91.101, Natural Resources Code...."

(D) In addition, Texas Health and Safety Code, §361.003(34), defines the term solid waste to include the following until the United States Environmental Protection Agency (EPA) delegates its authority under the Resource Conservation and Recovery Act, 42 United States Code (U.S.C.) §6901, et seq., (RCRA) to the RRC: "waste, substance or material that results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the EPA...."

(E) After delegation of RCRA authority to the Railroad Commission of Texas (RRC), the definition of solid waste (which defines TCEQ's jurisdiction) will not include hazardous wastes generated at natural gas or natural gas liquids processing plants, or reservoir pressure maintenance or repressurizing plants. The term natural gas or natural gas liquids processing plant refers to a plant the primary function of which is the extraction of natural gas liquids from field gas or fractionation of natural gas liquids. The term does not include a separately located natural gas treating plant for which the primary function is the removal of carbon dioxide, hydrogen sulfide, or other impurities from the natural gas stream. A separator, dehydration unit, heater treater, sweetening unit, compressor, or similar equipment is considered a part of a natural gas or natural gas liquids processing plant only if it is located at a plant the primary function of which is the extraction of natural gas liquids from field gas or fractionation of natural gas liquids. Further, a pressure maintenance or repressurizing plant is a plant for processing natural gas for reinjection (for reservoir pressure maintenance or repressurization) in a natural gas recycling project. A compressor station along a natural gas pipeline system or a pump station along a crude oil pipeline system is not a pressure maintenance or repressurizing plant.

(2) Railroad Commission of Texas (RRC).

(A) Generally, under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, wastes (both hazardous and nonhazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas by pipeline, and other activities regulated by the RRC are under the jurisdiction of the RRC. These wastes are termed "oil and gas wastes." In compliance with Texas Health and Safety Code, §361.025 (concerning exempt activities), a list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at §3.8(a)(30) of this title (relating to Water Protection) and at 30 Texas Administrative Code §335.1 (concerning definitions), which contains a definition of "activities associated with the exploration, development, and production of oil or gas or geothermal resources." This MOU provides further guidance regarding the agencies' interpretation of these rules and statutes.

(B) Notwithstanding subparagraph (A) of this paragraph, hazardous wastes generated at natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer RCRA. When the RRC is authorized by EPA to administer RCRA, jurisdiction over such hazardous wastes will transfer from the TCEQ to the RRC.

(c) Definition of hazardous waste.

(1) Under the Texas Health and Safety Code, §361.003(12), a "hazardous waste" subject to the jurisdiction of the TCEQ is defined as "solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as

amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §6901, et seq.)." Similarly, under Texas Natural Resources Code, §91.601(1), "oil and gas hazardous waste" subject to the jurisdiction of the RRC is defined as an "oil and gas waste that is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6901, et seq.)."

(2) Federal regulations adopted under authority of the federal Solid Waste Disposal Act, as amended by RCRA, exempt from regulation as hazardous waste certain oil and gas wastes. Under 40 Code of Federal Regulations (CFR) §261.4(b)(5), "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy" are described as wastes that are exempt from federal hazardous waste regulations.

(3) A partial list of wastes associated with oil, gas, and geothermal exploration, development, and production that are considered exempt from hazardous waste regulation under RCRA can be found in EPA's "Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes," 53 FedReg 25,446 (July 6, 1988). A further explanation of the exemption can be found in the "Clarification of the Regulatory Determination for Wastes from the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Energy, " 58 FedReg 15,284 (March 22, 1993). The exemption codified at 40 CFR §261.4(b)(5) and discussed in the Regulatory Determination has been, and may continue to be, clarified in subsequent guidance issued by the EPA.

(d) Jurisdiction over specific disposal activities.

(1) Discharges under Texas Water Code, Chapter 26. Under the Texas Water Code, Chapter 26, the TCEQ has jurisdiction over discharges of waste into or adjacent to water in the state, other than discharges regulated by the RRC. The RRC regulates discharges of waste from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas by pipeline, and from solution brine mining activities (except solution mining activities conducted for the purpose of creating caverns in naturally-occurring salt formations for the storage of wastes regulated by the TCEQ) under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26. Discharges of waste regulated by the RRC into water in the state shall not cause a violation of the water quality standards. While water quality standards are established by the TCEQ, the RRC has the responsibility for enforcing any violations of such standards. Texas Water Code, Chapter 26, does not require that discharges regulated by the RRC comply with regulations of the TCEQ that are not water quality standards. Because of the complexity of 30 Texas Administrative Code §307.6 (concerning toxic materials), the staffs of the TCEQ and the RRC will consult from time to time regarding application and interpretation of the Texas Surface Water Quality Standards.

(2) Disposal wells under Texas Water Code, Chapter 27. Jurisdiction over wastes disposed by injection is divided between the RRC and the TCEQ as set forth in Texas Water Code, Chapter 27 (the Injection Well Act). The RRC has jurisdiction under Texas Water Code, Chapter 27, over injection wells used to dispose of oil and gas waste. Texas Water Code, Chapter 27, defines "oil and gas waste" to mean "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources, waste arising out of or incidental to the underground storage of hydrocarbons other than storage in artificial tanks or containers, or waste arising out of or incidental to the operation of gasoline plants, natural gas processing plants, or pressure maintenance or repressurizing plants. The term includes but is not limited to salt water, brine, sludge, drilling mud, and other liquid or semi-liquid waste material." The term "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources" includes waste associated with transportation of crude oil or natural gas by pipeline pursuant to Texas Natural Resources Code, §91.101. The TCEQ has jurisdiction over injection wells used to dispose of other types of waste.

(3) Disposal of naturally occurring radioactive material (NORM). (The term "disposal" does not include receipt, possession, use, processing, transfer, transport, storage, or commercial distribution of radioactive materials, including NORM. These activities are under the jurisdiction of the Texas Department of Health per Texas Health and Safety Code, §401.011(a).)

(A) Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of NORM that constitutes, is contained in, or has contaminated oil and gas waste. This waste material is called "oil and gas NORM waste." Oil and gas NORM waste may be generated in connection with the exploration, development, or production of oil or gas. Oil and gas NORM waste may also be generated in connection with geothermal resource exploration, development, or production activities or solution brine mining activities.

(B) Under Texas Health and Safety Code, §401.412, the TCEQ has jurisdiction over the disposal of NORM which is not oil and gas NORM waste.

(e) Jurisdiction over waste from specific oil and gas activities.

(1) Drilling, operation, and plugging of wells associated with the exploration, development, or production of oil, gas, or geothermal resources. Wells associated with the exploration, development, or production of oil, gas, or geothermal resources include exploratory wells, cathodic protection holes, core holes, oil wells, gas wells, geothermal resource wells, fluid injection wells used for secondary or enhanced recovery of oil or gas, oil and gas waste disposal wells, and injection water source wells. Several types of waste materials can be generated during the drilling, operation, and plugging of these wells. These waste materials include drilling fluids (including water-based and oil-based fluids), cuttings, produced water, produced sand, waste hydrocarbons (including used oil), fracturing fluids, spent acid, workover fluids, treating chemicals (including scale inhibitors, emulsion breakers, paraffin inhibitors, and surfactants), waste cement, filters (including used oil filters), domestic sewage (including waterborne human waste and waste from activities such as bathing and food preparation), and trash (including inert waste, barrels, dope cans, oily rags, mud sacks, and garbage). Generally, these wastes, whether disposed of by discharge, landfill, land farm, evaporation, or injection, are subject to the jurisdiction of the RRC.

(2) Field treatment of produced fluids. Oil, gas, and water produced from oil, gas, or geothermal resource wells may be treated in the field in facilities such as separators, skimmers, heater treaters, dehydrators, and sweetening units. Waste materials that result from the field treatment of oil and gas include waste hydrocarbons (including used oil), produced water, hydrogen sulfide scavengers, dehydration wastes, treating and cleaning chemicals, filters (including used oil filters), asbestos insulation, domestic sewage, and trash are subject to the jurisdiction of the RRC.

(3) Storage of oil.

(A) Tank bottoms, stormwater runoff, and other wastes from the storage of crude oil (whether foreign or domestic) before it enters the refinery are under the jurisdiction of the RRC. In addition, waste resulting from storage of crude oil at refineries is subject to the jurisdiction of the TCEQ. Further, stormwater runoff from terminal facilities where both refined products intended for use offsite and crude oil

are stored in aboveground tanks is under the jurisdiction of the TCEQ. Stormwater runoff from a terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility is under the jurisdiction of the RRC.

(B) Wastes generated from storage tanks which are part of the refinery and wastes resulting from the wholesale and retail marketing of refined products are subject to the jurisdiction of the TCEQ.

(4) Underground hydrocarbon storage. The disposal of wastes, including saltwater, resulting from the construction, creation, operation, maintenance, closure, or abandonment of an "underground hydrocarbon storage facility" is subject to the jurisdiction of the RRC, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" have the meanings set out in Texas Natural Resources Code, §91.201.

(5) Underground natural gas storage. The disposal of wastes resulting from the construction, operation, or abandonment of an "underground natural gas storage facility" is subject to the jurisdiction of the RRC, provided that the terms "natural gas" and "storage facility" have the meanings set out in Texas Natural Resources Code, §91.173.

(6) Transportation of crude oil or natural gas.

(A) Crude oil and natural gas are transported by railcars, tank trucks, barges, tankers, and pipelines. The RRC has jurisdiction over waste from the transportation of crude oil by pipeline, regardless of the crude oil source (foreign or domestic) prior to arrival at a refinery. The RRC also has jurisdiction over waste from the transportation by pipeline of natural gas, including natural gas liquids, prior to the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The transportation wastes subject to the jurisdiction of the RRC include wastes from pipeline compressor or pressure stations and wastes from pipeline hydrostatic pressure tests and other pipeline operations. These wastes include waste hydrocarbons (including used oil), treating and cleaning chemicals, filters (including used oil filters), scraper trap sludge, trash, domestic sewage, wastes contaminated with polychlorinated biphenyls (PCBs) (including transformers, capacitors, ballasts, and soils), soils contaminated with mercury from leaking mercury meters, asbestos insulation, transite pipe, and hydrostatic test waters.

(B) The TCEQ has jurisdiction over waste from transportation of refined products by pipeline.

(C) The TCEQ also has jurisdiction over wastes associated with transportation of crude oil and natural gas, including natural gas liquids, by railcar, tank truck, barge, or tanker.

(7) Reclamation plants.

(A) The RRC has jurisdiction over wastes from reclamation plants that process wastes from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, such as lease tank bottoms. Waste management activities of reclamation plants for other wastes are subject to the jurisdiction of the TCEQ.

(B) In addition to waste management jurisdiction, the RRC has jurisdiction over the conservation and prevention of waste of crude oil and therefore must approve all movements of crude oil-containing materials to reclamation plants. The applicable statute and regulations consist primarily of reporting requirements for accounting purposes.

(8) Refining of oil.

(A) The management of wastes resulting from oil refining operations, including spent caustics, spent catalysts, still bottoms or tars, and API separator sludges, is subject to the jurisdiction of the TCEQ. The processing of light ends from the distillation and cracking of crude oil or crude oil products is considered to be a refining operation. The term "refining" does not include the processing of natural gas or natural gas liquids.

(B) The RRC has jurisdiction over refining activities for the conservation and the prevention of waste of crude oil. The RRC requires that all crude oil streams into or out of a refinery be reported for accounting purposes. In addition, the RRC requires that materials recycled and used as a fuel, such as still bottoms or waste crude oil, be reported.

(9) Natural gas or natural gas liquids processing plants (including gas fractionation facilities) and pressure maintenance or repressurizing plants. Wastes resulting from activities associated with these facilities include produced water, cooling tower water, sulfur bead, sulfides, spent caustics, sweetening agents, spent catalyst, waste hydrocarbons (including used oil), asbestos insulation, wastes contaminated with PCBs (including transformers, capacitors, ballasts, and soils), treating and cleaning chemicals, filters, trash, domestic sewage, and dehydration materials. These wastes are subject to the jurisdiction of the RRC under Texas Natural Resources Code, §91.101.Disposal of waste from activities associated with natural gas or natural gas liquids processing plants (including gas fractionation facilities), and pressure maintenance or repressurizing plants by injection is subject to the jurisdiction of the RRC under Texas Water Code, Chapter 27. Notwithstanding any contrary provision of this paragraph, until delegation of authority under RCRA to the RRC, the TCEQ shall have jurisdiction over wastes resulting from these activities that are not exempt from federal hazardous waste regulation under RCRA and that are considered hazardous under applicable federal rules.

(10) Manufacturing processes.

(A) Wastes that result from the use of natural gas, natural gas liquids, or products refined from crude oil in any manufacturing process, such as the production of petrochemicals or plastics, or from the manufacture of carbon black, are industrial wastes subject to the jurisdiction of the TCEQ. The term "manufacturing process" does not include the processing (including fractionation) of natural gas or natural gas liquids at natural gas or natural gas liquids processing plants.

(B) The RRC has jurisdiction under Texas Natural Resources Code, Chapter 87, to regulate the use of natural gas in the production of carbon black.

(11) Commercial service company facilities and training facilities.

(A) The TCEQ has jurisdiction over wastes generated at facilities, other than actual exploration, development, or production sites (field sites), where oil and gas industry workers are trained. In addition, the TCEQ has jurisdiction over wastes generated at facilities where materials, processes, and equipment associated with oil and gas industry operations are researched, developed, designed, and manufactured. However, wastes generated from tests of materials, processes, and equipment at field sites are under the jurisdiction of the RRC.

(B) The TCEQ also has jurisdiction over waste generated at commercial service company facilities operated by persons providing equipment, materials, or services (such as drilling and work over rig rental and tank rental; equipment repair; drilling fluid supply; and acidizing, fracturing, and cementing services) to the oil and gas industry. These wastes include the following wastes when they are generated at commercial service company facilities: empty sacks, containers, and

drums; drum, tank, and truck rinsate; sandblast media; painting wastes; spent solvents; spilled chemicals; waste motor oil; and unused fracturing and acidizing fluids.

(C) The term "commercial service company facility" does not include a station facility such as a warehouse, pipeyard, or equipment storage facility belonging to an oil and gas operator and used solely for the support of that operator's own activities associated with the exploration, development, or production or oil or gas or geothermal resources, including the transportation of crude oil or natural gas by pipeline.

(D) Notwithstanding subparagraphs (A)-(C) of this paragraph, the RRC has jurisdiction over disposal of oil and gas wastes, such as waste drilling fluids and NORM-contaminated pipe scale, that are managed at commercial service company facilities.

(E) The RRC also has jurisdiction over wastes such as vacuum truck rinsate and tank rinsate generated at facilities operated by oil and gas waste haulers permitted by the RRC pursuant to §3.8(f) of this title (relating to water protection).

(12) Spill response. Contaminated soil and other wastes that result from a spill must be managed in accordance with the governing statutes and regulations adopted by the agency responsible for the activity that resulted in the spill. Coordination of issues of spill notification, prevention, and response shall be addressed in the State of Texas Oil and Hazardous Substance Spill Contingency Plan and may be addressed further in a separate Memorandum of Understanding among these agencies and other appropriate state agencies.

(f) Interagency activities.

(1) Recycling and pollution prevention.

(A) The TCEQ and the RRC encourage generators to eliminate pollution at the source and recycle whenever possible to avoid disposal of solid wastes. Questions regarding source reduction and recycling may be directed to the TCEQ Small Business and Environmental Assistance Division, telephone number (800) 447-2827, or to the Waste Minimization Program at the RRC. The TCEQ reserves the right to require generators to explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the RRC at a facility regulated by the TCEQ; similarly, the RRC reserves the right to require generators to explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the TCEQ at a facility regulated by the RRC.

(B) The TCEQ Small Business and Environmental Assistance Division and the RRC Waste Minimization Program will meet at least two times each year to maintain a working relationship to enhance the efforts to share information and use resources more efficiently. The TCEQ Small Business and Environmental Assistance Division will make the proper TCEQ personnel aware of the services offered by the RRC Waste Minimization Program, share information with the RRC Waste Minimization Program to maximize services to oil and gas operators, and advise oil and gas operators of RRC Waste Minimization Program services. The RRC Waste Minimization Program will make the proper RRC personnel aware of the services offered by the TCEQ Small Business and Environmental Assistance Division, share information with the TCEQ Small Business and Environmental Assistance Division to maximize services to industrial operators, and advise industrial operators of the TCEQ Small Business and Environmental Assistance Division services.

(2) Treatment of wastes under RRC jurisdiction at facilities registered by TCEQ's Petroleum Storage Tank Division.

(A) Soils contaminated with constituents that are physically and chemically similar to those normally found in soils at leaking underground petroleum storage tanks from generators under the jurisdiction of the RRC are eligible for treatment at TCEQ regulated soil treatment facilities once alternatives for recycling and source reduction have been explored. For the purpose of this provision, soils containing petroleum substance(s) as defined in 30 Texas Administrative Code §334.481 (concerning definitions) are considered to be similar, but drilling muds, acids, or other chemicals used in oil and gas activities are not considered similar. Generators under the jurisdiction of the RRC must meet the same requirements as generators under the jurisdiction of the TCEQ when sending their petroleum contaminated soils to soil treatment facilities under TCEQ jurisdiction. Those requirements are in 30 Texas Administrative Code §334.496 (concerning shipping procedures applicable to generators of petroleum-substance waste), except subsection (c) which is not applicable, and 30 Texas Administrative Code §334.497 (concerning recordkeeping and reporting procedures applicable to generators). RRC generators with questions on these requirements should call the TCEQ Petroleum Storage Tank (PST) Division, Responsible Party Investigations Section, telephone number (512) 239-2200.

(B) Generators under RRC jurisdiction should also be aware that TCEQ regulated soil treatment facilities are required by 30 Texas Administrative Code §334.499 (concerning shipping requirements applicable to owners or operators of storage, treatment, or disposal facilities) to maintain documentation on the soil sampling and analytical methods, chain-of-custody, and all analytical results for the soil received at the facility and transported off-site or reused on-site.

(C) The RRC must specifically authorize management of contaminated soils under its jurisdiction at facilities registered by the PST Division of the TCEQ. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations.

(D) All waste materials, including those that have been treated, that are subject to the jurisdiction of the RRC and are managed at facilities registered by the PST Division of the TCEQ will remain subject to the jurisdiction of the RRC. Such materials will be subject to RRC regulations regarding final reuse, recycling, or disposal.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities registered by the PST Division of the TCEQ.

(3) Disposal of wastes under RRC jurisdiction at facilities permitted by the TCEQ.

(A) As provided in this paragraph, waste materials subject to the jurisdiction of the RRC may be managed at solid waste facilities under the jurisdiction of the TCEQ once alternatives for recycling and source reduction have been explored. The RRC must specifically authorize management of wastes under its jurisdiction at facilities regulated by the TCEQ. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations. In addition, except as provided in subparagraph (B) of this paragraph, the concurrence of the TCEQ is required to manage waste under the jurisdiction of the RRC at a facility regulated by the TCEQ. The TCEQ's concurrence may be subject to specified conditions.

(B) A facility under the jurisdiction of the TCEQ may accept, without further individual concurrence, waste under the jurisdiction of the RRC if that facility is permitted or otherwise authorized to accept that particular type of waste. The phrase "that type of waste" does not specifically refer to waste under the jurisdiction of the RRC, but rather to the waste's physical and chemical characteristics.

(C) In all other instances, individual written concurrences from the TCEQ shall be required to manage wastes under the jurisdiction of the RRC at TCEQ regulated facilities. (This is required only if the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization provided by the TCEQ.) To obtain an individual concurrence, the waste generator must provide to the TCEQ sufficient information to allow the concurrence determination to be made, including the identity of the proposed waste management facility, the process generating the waste, the quantity of waste, and the physical and chemical nature of the waste involved (using process knowledge and/or laboratory analysis as defined in 30 Texas Administrative Code, Chapter 335, Subchapter R (concerning waste classification)). In obtaining TCEQ approval, generators may use their existing knowledge about the process or materials entering it to characterize their wastes. Material Safety Data Sheets, manufacturer's literature, and other documentation generated in conjunction with a particular process may be used. Process knowledge must be documented and submitted with the request for approval.

(D) Notwithstanding subparagraphs (A)-(C) of this paragraph, waste sludge subject to the jurisdiction of the RRC, other than domestic septage that is not mixed with other waste materials, may not be applied to the land at a facility permitted by the TCEQ for the beneficial use of sewage sludge or water treatment sludge. Domestic septage collected from portable toilets at facilities subject to RRC jurisdiction that is not mixed with other waste materials may be managed at a facility permitted by the TCEQ for disposal, incineration, or land application for beneficial use of such domestic septage waste without specific authorization from the TCEQ.

(E) Additional guidance regarding requirements for, and restrictions on, management of particular types of wastes regulated by the RRC at facilities registered or permitted by the TCEQ may be issued in the future.

(F) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities under the jurisdiction of the TCEQ. If a receiving facility nevertheless requests or requires a TCEQ waste code for waste under the jurisdiction of the RRC, a code consisting of the following may be provided:

(i) the sequence number "RRCT";

(ii) the appropriate form code, as specified in 30 Texas Administrative Code Chapter 335, Subchapter R, Appendix 3 (concerning form codes); and

(iii) the waste classification code "H" if the waste is a hazardous oil and gas waste, or "R" if the waste is a nonhazardous oil and gas waste.

(G) If a facility requests or requires a TCEQ waste generator registration number for wastes under the jurisdiction of the RRC, the registration number "XXXRC" may be provided.

(H) Wastes that are under the jurisdiction of the RRC need not be reported to the TCEQ's Industrial and Hazardous Waste Division.

(4) Management of nonhazardous wastes under TCEQ jurisdiction at facilities regulated by the RRC.

(A) Once alternatives for recycling and source reduction have been explored, and with prior authorization from the RRC, the following nonhazardous wastes subject to the jurisdiction of the TCEQ may be disposed of, other than by injection into a Class II well, at a facility regulated by the RRC; bioremediated at a facility regulated by the RRC (prior to reuse, recycling, or disposal); or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous wastes that are chemically and physically similar to oil and gas wastes, but excluding soils, media, debris, sorbent pads, and other clean-up materials that are contaminated with refined petroleum products.

(B) To obtain an individual authorization from the RRC, the waste generator must provide the following information, in writing, to the RRC: the identity of the proposed waste management facility, the quantity of waste involved, a hazardous waste determination that addresses the process generating the waste and the physical and chemical nature of the waste, and any other information that the RRC may require. As appropriate, the RRC shall reevaluate any authorization issued pursuant to this paragraph.

(C) Once alternatives for recycling and source reduction have been explored, and subject to the RRC's individual authorization, the following wastes under the jurisdiction of the TCEQ are authorized without further TCEQ approval to be disposed of at a facility regulated by the RRC, bioremediated at a facility regulated by the RRC, or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous bottoms from tanks used only for crude oil storage; unused and/or reconditioned drilling and completion/workover wastes from commercial service company facilities; used and/or unused drilling and completion/workover wastes generated at facilities where workers in the oil and gas exploration, development, and production industry are trained; used and/or unused drilling and completion/workover wastes generated at facilities where materials, processes, and equipment associated with oil and gas exploration, development, and production operations are researched, developed, designed, and manufactured; unless other provisions are made in the underground injection well permit used and/or unused drilling and completion wastes (but not workover wastes) generated in connection with the drilling and completion of Class I, III, and V injection wells; wastes (such as contaminated soils, media, debris, sorbent pads, and other cleanup materials) associated with spills of crude oil and natural gas liquids if such wastes are under the jurisdiction of the TCEQ; and sludges from washout pits at commercial service company facilities.

(D) In a public health, public safety, or environmental emergency, the RRC and the TCEQ may consider allowing injection of wastes under the jurisdiction of the TCEQ into Class II injection wells permitted by the RRC.

(E) Pursuant to Texas Water Code, §27.0511(g), TCEQ concurrence is required for injection of TCEQ-regulated waste in connection with a secondary or tertiary recovery project.

(F) Additional guidance regarding requirements for, and restrictions on, management of particular types of wastes covered under this MOU may be issued in the future.

(5) Drilling in landfills. The TCEQ will notify the Environmental Services Section of the Oil and Gas Division of the RRC and the landfill owner at the time a drilling application is submitted if an operator proposes to drill a well through a landfill regulated by the TCEQ. The RRC and the TCEQ will cooperate and coordinate with one another in advising the appropriate parties of measures necessary to reduce the potential for the landfill contents to cause groundwater contamination as a result of landfill disturbance associated with drilling operations.

(6) Coordination of enforcement actions and cooperative sharing of enforcement information.

(A) In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the TCEQ at a facility permitted by the RRC, the TCEQ is responsible for enforcement

actions against the generator or transporter, and the RRC is responsible for enforcement actions against the disposal facility. In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the RRC at a facility permitted by the TCEQ, the RRC is responsible for enforcement actions against the generator or transporter, and the TCEQ is responsible for enforcement actions against the disposal facility.

(B) The TCEQ and the RRC agree to cooperate with one another by sharing enforcement information. Employees of either agency who discover, in the course of their official duties, information that indicates a violation of a statute, regulation, order, or permit pertaining to wastes under the jurisdiction of the other agency, are encouraged to notify the other agency. In addition, to facilitate enforcement actions, each agency is encouraged to share information in its possession with the other agency if requested by the other agency to do so.

(g) Definitions. Words shall have meaning as defined in the rules of each agency. Words not so defined shall have their regular meaning as used as a term of art in industry practice.

(h) Disputes. The staff of the RRC and the TCEQ shall meet as necessary to attempt to resolve any disputes regarding interpretation of this MOU and disputes regarding definitions and terms of art. If a staff-level meeting fails to resolve the dispute, the dispute will be elevated to the senior management of both agencies for resolution.

(i) Effective date. This Memorandum of Understanding, as of its effective date, shall supersede the prior Memorandum of Understanding among the agencies, dated December 1, 1987.

§3.81. Brine Mining Injection Wells.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affected person--A person who, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public.

(2) Brine mining facility or facility--The brine mining injection well, and the pits, tanks, fresh water wells, pumps, and other structures and equipment that are or will be used in conjunction with the brine mining injection well.

(3) Brine mining injection well--A well used to inject fluid for the purpose of extracting brine by the solution of a subsurface salt formation. The term "brine mining injection well" does not include a well used to inject fluid for the purpose of leaching a cavern for the underground storage of hydrocarbons or the disposal of waste, or a well used to inject fluid for the purpose of extracting sulphur by the thermofluid mining process.

(4) Commission--The Railroad Commission of Texas.

(5) Director--The director of the Oil and Gas Division or a staff delegate designated in writing by the director of the Oil and Gas Division or the commission.

(6) Existing brine mining injection well--A brine mining injection well in which injection operations began prior to the effective date of this section.

(7) Fresh water--Water having bacteriological, physical, and chemical properties that make it suitable and feasible for beneficial use for any lawful purpose.

(8) New brine mining injection well--A brine mining injection well in which injection operations begin on or after the effective date of this section.

(9) Permit--A written authorization issued by the commission under this section for the operation of a brine mining injection well.

(10) Person--A natural person, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust partnership, association, or any other legal entity.

(11) Pollution--The alteration of the physical, chemical, or biological quality of, or the contamination of, water that makes it harmful, detrimental, or injurious to humans, animal life, vegetation or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(b) Prohibitions.

(1) Unauthorized injection. No person may operate a brine mining injection well without obtaining a permit from the commission under this section. No person may begin constructing a new brine mining injection well until the commission has issued a permit to operate the well under this section and a permit to drill, deepen, plug back, or reenter the well under §3.5 of this title (relating to Application to Drill, Deepen, or Plug Back) (Rule 5).

(2) Fluid migration. No person may operate a brine mining injection well in a manner that allow fluids to escape from the permitted injection zone. If fluids are migrating from the permitted injection zone, the operator shall immediately cease injection operations.

(3) Falsifying documents and tampering with gauges. No person may knowingly make any false statement, representation, or certification in any application, report, record, or other document submitted or required to be maintained under this section or under any permit issued pursuant to this section, or falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained under this section or under any permit issued pursuant to this section.

(c) Standards for permit issuance. A permit may be issued only if the commission determines that the operation of the brine mining injection well will not result in the pollution of fresh water. All permits issued under this section will contain the conditions required by subsections (f) and (g) of this section, and all other conditions reasonably necessary to prevent the pollution of fresh water.

(d) Permit application.

(1) Duty to apply. Any person who operates or proposes to operate a brine mining injection well shall file a permit application with the commission in Austin within the time provided in paragraph (2) of this subsection. The applicant shall mail or deliver a copy of the application to the appropriate district office on the same day the application is mailed or delivered to the commission in Austin. A permit application will be considered filed with the commission on the date it is received by the commission in Austin.

(2) Time to apply.

(A) Any person who proposes to operate a new brine mining injection well shall file a permit application at least 180 days before the date on which injection is to begin, unless a later date has been authorized by the director.

(B) Any person who is operating an existing brine injection well shall file a permit application within 90 days of the effective date of this section.

(C) Any person who has obtained a permit under this section and who wishes to continue to operate the brine mining injection well after the permit expires shall file an application for new permit

at least 180 days before the existing permit expires, unless a later date has been authorized by the director.

(3) Who applies. When a brine mining facility is owned by one person but is operated by another person, it is the operator's duty to file an application for a permit.

(4) Application requirements for all applicants. All applicants shall submit the following information, using application forms supplied by the commission:

(A) name, mailing address, and location of the brine mining facility for which the application is submitted;

(B) the operator's name, mailing address, telephone number, and status as federal, state, private, public, or other entity, and a statement indicating whether the operator is the owner of the facility;

(C) the proposed uses for the brine mined at the facility;

(D) a listing of all permits or construction approvals for the facility received or applied for under federal or state environmental programs;

(E) a topographic map, or other map if the topographic map is unavailable, extending one mile beyond the property boundaries of the facility, depicting the facility and those springs, other surface water bodies, drinking water wells, and other wells listed in public records or otherwise known to the applicant within 1/4 mile of the facility property boundary;

(F) a plat showing the oil and gas operators of the tract on which the facility is located and the tracts adjacent to the tract on which the facility is located. On the plat or on a separate sheet attached to the plat, the applicant shall list the names and addresses of the oil and gas operators;

(G) a plat showing the surface ownership of the tract on which the facility is located and the tracts adjacent to the tract on which the facility is located. On the plat or on a separate sheet attached to the plat, the applicant shall list the names and addresses of the surface owners, as determined from the current county tax rolls or other reliable sources, and shall identify the source of the list. If the director determines that, after diligent efforts, the applicant has been unable to ascertain the name and address of one or more surface owners, the director may waive the requirements of this subparagraph with respect to those surface owners;

(H) a map with surveys marked showing the type, location, and depth of all wells of public record within a 1/4 mile radius of the brine mining injection well that penetrate the salt formation. The applicant shall attach the following information to the map:

(i) a tabulation of the wells showing the dates the wells were drilled and the present status of the wells; and

(ii) plugging records for plugged and abandoned wells and completion records for other wells;

(I) a letter from the Texas Commission on Environmental Quality stating the depth to which fresh water strata should be protected;

(J) a complete electric log of the brine mining injection well or a nearby well. On the log, the applicant shall identify the geologic formations between the land surface and the top of the salt formation and the depths at which they occur;

(K) a drawing of the surface and subsurface construction details of the brine mining injection well;

(L) the proposed maximum daily injection rate and maximum injection pressure;

(M) the proposed injection procedure;

(N) the proposed mechanical integrity testing procedure;

(O) the source of mining water to be used at the facility. If the source is groundwater, the following information must be included:

(i) the groundwater formation name;

(ii) an depth of the groundwater formation; and

(iii) an analysis of the groundwater;

(P) the direction of the hydraulic gradient in the area; and

(Q) the proposed groundwater monitoring plan, or an alternate plan for assuring that fluids are not escaping from the permitted injection zone.

(5) Additional information. The applicant shall submit any other information required on the application form supplied by the commission. In addition to the information reported on the application form, the applicant shall submit, at the director's request, any other information the commission may reasonably require to assess the brine mining injection well and to determine whether to issue a permit.

(e) Signatories to applications and reports.

(1) Applications. All applications shall be signed as follows:

(A) for a corporation, by a responsible corporate officer. A responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy-making or decision-making functions for the corporation; or

(B) for a partnership or sole proprietorship, by a general partner or the proprietor, respectively.

(2) Reports. All reports required by permits and other information requested by the commission shall be signed by a person described in paragraph (1) of this subsection or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(A) the authorization is made in writing by a person described in paragraph (1) of this subsection;

(B) the authorization specifies an individual or position having responsibility for the overall operation of the regulated facility; and

(C) the authorization is submitted to the commission before or together with any report of information signed by the authorized representative.

(3) Certification. Any person signing a document under paragraph (1) or (2) of this subsection shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or who are directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and

complete. I am aware that there are significant penalties for submitting false information."

(f) Conditions applicable to all permits. The conditions specified in this subsection apply to all permits.

(1) Duty to comply. The operator shall comply with all conditions of the permit. Any permit noncompliance is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application.

(2) Duty to reapply. If the operator wishes to continue a permitted activity after the expiration date of the permit, the operator shall apply for and obtain a new permit.

(3) Need to halt or reduce activity not a defense. It is not a defense for an operator in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

(4) Duty to mitigate. The operator shall take all reasonable steps to minimize and correct any adverse effect on the environment resulting from noncompliance with the permit.

(5) Proper operation and maintenance. The operator shall at all times properly operate and maintain all facilities and systems of treatment and control, and related appurtenances, that are installed or used by the operator to achieve compliance with the conditions of the permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up and auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

(6) Permit actions. The permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the operator for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(7) Property rights. The permit does not convey any property rights of any sort, or any exclusive privilege.

(8) Duty to provide information. The operator shall also furnish to the commission, within a time specified by the commission, any information that the commission may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit, or to determine compliance with the permit. The operator shall also furnish to the commission, upon request, copies of records required to be kept under the conditions of the permit.

(9) Inspection and entry. The operator shall allow any member or employee of the commission, on proper identification, to:

(A) enter upon the premises where a regulated activity is conducted or where records are kept under the conditions of the permit;

(B) have access to and copy, during reasonable working hours, any records required to be kept under the conditions of the permit;

(C) inspect any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and

(D) sample or monitor any substance or parameter for the purpose of assuring compliance with the permit or as otherwise authorized by the Texas Water Code, §27.071, or the Texas Natural Resources Code, §91.1012.

(10) Monitoring and records.

(A) Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity.

(B) The operator shall retain records of all monitoring information, including all calibration and maintenance records and all original chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the permit application, for at least three years from the date of the sample, measurement, report, or application. This period may be extended by request of the commission at any time.

(C) Records of monitoring information must include the date, exact place, and time of the sampling or measurements; the individual(s) who performed the sampling or measurements; the date(s) analyses were performed; the individual(s) who performed the analyses; the analytical techniques or methods used; and the results of the analyses.

(11) Signatory requirements. All reports and other information submitted to the commission shall be signed and certified in accordance with subsection (e) of this section.

(12) Reporting requirements.

(A) The operator shall notify the commission as soon as possible of any planned physical alteration or addition to the facility.

(B) The operator shall give advance notice to the commission of any planned changes in the facility that may result in noncompliance with permit requirements.

(C) Monitoring results shall be reported at the intervals specified in the permit.

(D) Reports of compliance or noncompliance with the requirements contained in any compliance schedule of the permit shall be submitted no later than 30 days after each scheduled date.

(E) The operator shall report to the commission any noncompliance that may endanger human health or the environment.

(i) An oral report shall be made to the appropriate district office immediately after the operator becomes aware of the noncompliance. A written report shall be filed with the Austin office within five days of the time the operator becomes aware of the noncompliance. The written report must contain the following information:

(I) a description of the noncompliance and its cause;

(II) the period of noncompliance, including exact dates and times, and, if the noncompliance has not been corrected, the anticipated time it is expected to continue; and

(III) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

(ii) Information that shall be reported under this subparagraph includes the following:

(I) any monitoring or any other information that indicates that any contaminant may endanger fresh water; or

(II) any noncompliance with a permit condition or malfunction of the injection system that may cause fluid migration into or between fresh water strata.

(F) The operator shall report any noncompliance not reported under subparagraphs (C), (D), and (E) of this paragraph at the time monitoring reports are submitted. The report must contain the information listed in subparagraph (E) of this paragraph.

(G) If the operator becomes aware that it failed to submit any relevant facts or submitted incorrect information in a permit application or a report to the commission, the operator shall promptly submit the relevant facts or correct information.

(13) Transfers. The permit is not transferable to any person except by modification, or revocation and reissuance, to change the name of the operator and incorporate other necessary requirements.

(14) Completion report. Injection operations may not begin in any new brine mining injection well until the operator has submitted a completion report to the director, and the director has reviewed the completion report and found the well in compliance with the conditions of the permit.

(15) Workovers. The operator shall notify the appropriate district office at least 48 hours before performing any workover or corrective maintenance operations that involve the removal of the tubing or well stimulation.

(16) Mechanical integrity.

(A) No person may perform injection operations in a brine mining injection well that lacks mechanical integrity. A well has mechanical integrity if:

(i) there is not significant leak in the casing; and

(ii) there is no significant fluid movement into fresh water strata through vertical channels adjacent to the wellbore.

(B) For any existing brine mining injection well, mechanical integrity must be demonstrated annually. For any new brine mining injection well, mechanical integrity must be demonstrated before injection operations begin and annually thereafter. In addition, for all brine mining injections wells, mechanical integrity must be demonstrated after any workover that involves the removal of the tubing.

(C) To demonstrate the absence of a significant leak in the casing, the operator shall conduct a fluid pressure test in accordance with the following procedures:

(i) the operator shall submit a written test procedure to the commission in Austin at least 15 days before the test;

(ii) the operator shall notify the district office orally at least 48 hours before the test;

(iii) the operator shall perform the test using the test procedure submitted prior to the testing unless otherwise instructed by the commission; and

(iv) the operator shall file a complete record of the test with the commission in Austin within 30 days after the test.

(D) In lieu of an annual fluid pressure test, the operator may monitor the pressure of a hydrocarbon pad or blanket contained in the annulus space of the well, provided the operator has obtained written approval from the director prior to using this method.

(E) One of the following methods shall be used to demonstrate the absence of significant fluid movement into fresh water strata through vertical channels adjacent to the wellbore:

(i) the results of a temperature or noise log; or

(ii) where the nature of the casing precludes the use of the logging techniques prescribed in clause (i) of this subparagraph, cementing records demonstrating the presence of adequate cement to prevent such movement.

(F) The director may allow the use of a method of demonstrating mechanical integrity other than one listed in subparagraphs (C), (D), and (E) of this paragraph with the approval of the administrator of the Environmental Protection Agency obtained pursuant to 40 Code of Federal Regulations §146.8(d).

(G) Mechanical integrity must be demonstrated to the satisfaction of the director. In conducting and evaluating the results of a mechanical integrity test, the operator and the director will apply procedures and standards generally accepted in the industry. In reporting the results of a mechanical integrity test, the operator must include a description of the method and procedures used. In evaluating the results, the director will review monitoring and other test data submitted since the previous mechanical integrity test.

(17) Notice of conversion or abandonment. The operator shall notify the commission at such times as the permit requires before conversion or abandonment of the well.

(18) Plugging. Within one year after cessation of brine mining injection operations, the operator shall plug the well in accordance with §3.14(a) and (c)(h) of this title (relating to Plugging) (Rule 14(a) and (c)-(h)). For good cause, the director may grant a reasonable extension of time in which to plug the well if the operator submits a proposal that describes actions or procedures to ensure that the well will not endanger fresh water during the period of the extension.

(g) Other permit conditions. In addition to the conditions required in all permits, the commission will establish conditions, as required on a case-by-case basis, to provide for and assure compliance with the requirements specified in this subsection.

(1) Duration. Permits will be effective for a term up to the operating life of the facility. The commission will review each permit issued pursuant to this section at least once every five years to determine whether cause exists for modification, revocation and reissuance, or termination of the permit.

(2) Operating requirements. Permits will prescribe operating requirements, which will at a minimum specify that:

(A) except during well stimulation, injection pressure at the wellhead may not exceed a maximum calculated to assure that the injection pressure does not initiate new fractures or propagate existing fractures in the injection zone; and

(B) in no case may the injection pressure initiate fractures in the confining zone or cause the escape of injection or formation fluids from the injection zone.

(3) Monitoring requirements. Permits will specify the following monitoring requirements:

(A) requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods;

(B) requirements concerning the type, intervals, and frequency of monitoring sufficient to yield data representative of the monitored activity, including continuous monitoring when appropriate; and

(C) requirements to report monitoring results with a frequency dependent on the nature and effect of the monitored activity, but in no case less than quarterly.

(4) Construction requirements. Permits will specify construction requirements to assure that the injection operations will not endanger fresh water. Changes in construction requirements during construction may be approved by the director as minor modifications of the permit. No such changes may be physically incorporated into

the construction of the well prior to approval of the modifications by the director.

(A) An existing brine mining injection well shall achieve compliance with the construction requirements according to a compliance schedule established as soon as possible and in no case later than one year after the effective date of the permit. The permit will require the operator to submit a written compliance report within 30 days after compliance has been achieved.

(B) A new brine mining injection well must be cased and cemented in accordance with §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements), (Rule 13), provided, however, that the operator shall set and cement surface casing in accordance with the letter obtained from the Texas Commission on Environmental Quality pursuant to subsection (d)(4)(I) of this section regardless of the total depth of the well. No alternative program for setting less surface casing will be authorized.

(C) Appropriate logs and other tests must be conducted during the drilling and construction of a new brine mining injection well. A descriptive report interpreting the results of such logs and tests must be prepared by a knowledgeable log analyst and submitted to the director. The logs and tests appropriate to each well will be determined based on the depth, construction, and other characteristics of the well, the availability of similar data in the area, and the need for additional information that may arise from time to time as the construction of the well progresses.

(5) Financial responsibility. It shall be a permit condition that the operator maintain financial responsibility and resources to plug and abandon the brine mining injection well. The operator shall show evidence of such financial responsibility to the commission by submitting a surety bond or letter of credit in a form prescribed by the commission. Such bond or letter of credit shall be maintained until the well is plugged in accordance with subsection (f)(18) of this section.

(6) Corrective action. For all known wells that penetrate the injection zone within a 1/4 mile radius of the brine mining injection well and are improperly completed, plugged, or abandoned, the commission will consider requiring corrective action to prevent movement of fluid into fresh water strata.

(A) In determining the need for corrective action, the commission will consider the following factors: nature and volume of injected fluid; nature of native fluids; potentially affected population; geology; hydrology; history of the injection operation; completion and plugging records; abandonment procedures in effect at the time a well was abandoned; and hydraulic connections with fresh water.

(B) For an existing brine mining injection well requiring corrective action, any permit issued will include a compliance schedule leading to compliance with corrective action requirements. The compliance schedule will require compliance as soon as possible and in no case later than one year after the effective date of the permit. The permit will require the operator to submit a written compliance report within 30 days after all required corrective action has been taken.

(C) For a new brine mining injection well, the operator may not begin injection operations until all required corrective action has been taken.

(h) Modification, revocation and reissuance, and termination of permits. A permit may be modified, revoked and reissued, or terminated by the commission either upon the written request of any interested person, including the operator, or upon the commission's initiative, but only for the reasons and under the conditions specified in this subsection. Except for minor modifications made under paragraph (2) of this subsection, the commission will follow the applicable procedures in subsection (i) of this section. In the case of a modification, the commission may request additional information or an updated application. In the case of a revocation and reissuance, the commission will require a new application. If a permit is modified, only the conditions subject to modification are reopened. The term of a permit may not be extended by modification. If a permit is revoked and reissued, the entire permit is reopened and subject to revision, and the permit is reissued for a new term.

(1) Modification, or revocation and reissuance. The following are causes for modification, or revocation and reissuance:

(A) material and substantial alterations or additions to the facility occurred after permit issuance and justify permit conditions that are different or absent in the existing permit;

(B) the commission receives new information;

(C) the standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued;

(D) the commission determines good cause exists for modifying a compliance schedule, such as a act of God, strike, flood, materials shortage, or other event over which the operator has little or no control and for which there is no reasonably available remedy;

(E) cause exists for terminating a permit under paragraph (3) of this subsection, and the commission determines that modification, or revocation and reissuance, is appropriate; or

(F) a transfer of the permit is proposed.

(2) Minor modifications. With the operator's consent, the director may make minor modifications to a permit administratively, without following the procedures of subsection (i) of this section. Minor modifications may only:

(A) correct clerical or typographical errors, or clarify any description or provision in the permit, provided that the description or provision is not changed substantively;

(B) require more frequent monitoring or reporting;

(C) change construction requirements provided that any changes shall comply with the requirements of subsection (g)(4) of this section; or

(D) allow a transfer of the permit where the director determines that no change in the permit is necessary other than a change in the name of the operator, provided that a written agreement between the current operator and the new operator containing a specific data for the transfer of permit responsibility, coverage, and liability has been submitted to the commission.

(3) Termination. The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(A) the operator fails to comply with any condition of the permit or this section;

(B) the operator fails to disclose fully all relevant facts in the permit application or during the permit issuance process, or misrepresents any relevant fact at any time;

(C) a material change of conditions occurs in the operation or completion of the well, or there are material changes in the information originally furnished;

(D) the commission determines that the permitted injection endangers human health or the environment, or that pollution

of fresh water is occurring or is likely to occur as a result of the permitted injection; or

(E) fluids are escaping from the permitted injection zone.

(i) Permitting procedures.

(1) Review of applications. Upon receipt of an application for a permit, the director will review the application for completeness. Within 30 days after receipt of the application, the director will notify the applicant in writing whether the application is complete or deficient. A notice of deficiency will state the additional information necessary to complete the application, and a date for submitting this information. The application will be deemed withdrawn if the necessary information is not received by the specified date, unless the director has extended this date upon request of the applicant. Upon timely receipt of the necessary information, the director will notify the applicant that the application is complete. The director will not begin processing a permit until the application is complete.

(2) Permit denial. If the director administratively denies a permit application, a notice of administrative denial will be mailed to the applicant. The applicant will have a right to a hearing on request. If the applicant requests a hearing, the notice of administrative denial will be subject to the same procedures as a draft permit prepared under paragraph (3) of this subsection.

(3) Draft permits.

(A) A draft permit will be prepared when the director tentatively decides:

(i) to issue a permit;

(ii) to modify, or revoke and reissue, a permit; or

(iii) to terminate a permit, in which case the director will prepare a notice of intent to terminate, which is a type of draft permit.

(B) A draft permit will contain all proposed permit conditions.

(4) Fact sheets. The director will prepare a fact sheet to accompany every draft permit that the director finds is the subject of widespread public interest or raises important issues. The fact sheet will briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The fact sheet will include information satisfying the requirements of 40 Code of Federal Regulations §124.8(b).

(5) Notice.

(A) The commission will give notice when a draft permit is prepared under paragraph (3) of this subsection, and when a hearing is scheduled under paragraph (7) of this subsection.

(B) Notice will be given by the methods specified in this subparagraph.

(i) A copy of the notice will be mailed to the following persons:

(I) any agency that the commission knows has issued or is required to issue a permit for the same facility under any federal or state environmental program;

(II) the United States Environmental Protection Agency;

(III) persons on a mailing list developed according to 40 Code of Federal Regulations §124.10(c)(1)(viii);

(IV) any unit of local government having jurisdiction over the area where the facility is or is proposed to be located, and each state agency having any authority under state law with respect to the construction or operation of the facility;

(V) the operator; and

(VI) any oil and gas operators or surface owners required to be listed in the application under subsection (d)(4)(F) and (G) of this section. If, pursuant to subsection (d)(4)(G), the director waived the requirement to list certain surface owners in the application, the applicant shall notify such persons by publishing the notice. The notice shall be published by the applicant once each week for two consecutive weeks in a newspaper of general circulation for the county where the facility is located. The applicant shall file proof of publication with the commission in Austin.

(ii) The notice shall be published by the applicant at least once in a newspaper of general circulation for the county where the facility is located. The applicant shall file proof of publication with the commission in Austin.

(C) Notices will include information satisfying the requirements of 40 Code of Federal Regulations §124.10(d) and the Texas Government Code, Chapter 2001.

(D) A copy of any draft permit, fact sheet, and application will be mailed to the persons notified under subparagraph (B)(i)(I) and (II) of this paragraph, and to any other person upon request. The applicant will be mailed a copy of any draft permit and fact sheet.

(E) The Texas Commission on Environmental Quality, the Texas Water Development Board, the Texas Department of Health, the Texas Parks and Wildlife Department, the United States Fish and Wildlife Service, other state and federal agencies with jurisdiction over fish, shellfish, and wildlife resources, the Advisory Council on Historic Preservation, state historic preservation officers, and other appropriate government authorities will be given opportunity to receive copies of notices, applications, draft permits, and fact sheets.

(6) Comments and requests for hearing. Notice of a draft permit will allow at least 30 days for public comment. During the public comment period, any interested person may submit written comments on the draft permit and may request a hearing if one has not already been scheduled.

(7) Hearings on draft permits.

(A) A hearing will be held:

(i) when the director finds, on the basis of requests, a significant degree of public interest in a draft permit;

(ii) when an applicant or an affected person requests a hearing on a draft permit; or

(iii) when an operator requests a hearing on a draft permit prepared when the director tentatively decides to modify, revoke and reissue, or terminate a permit.

(B) The commission may hold a hearing at its discretion, for instance, when a hearing might clarify one or more issues involved in the permit decision.

(C) Notice of a hearing will be given at least 30 days before the hearing. The public comment period under paragraph (6) of this subsection will automatically be extended to the close of any hearing under this paragraph.

(8) Administrative approval. After the close of the public comment period, the director may issue, modify, revoke and reissue,

or terminate a permit administratively if no hearing is required under paragraph (7) of this subsection.

(9) Response to comments. When a final permit is issued, the commission will respond in writing to comments received during the public comment period. The response will be made available to the public and will:

(A) specify which provisions, if any, of the draft permit have been changed in the final permit, and the reasons for the changes; and

(B) briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing on the draft permit.

(j) Commission review of administrative actions. Administrative actions performed by the director or commission staff pursuant to this section are subject to review by the commissioners.

(k) Federal regulations. All references to the Code of Federal Regulations in this section are references to the 1987 edition of the Code. The following federal regulations are adopted by reference and can be obtained at the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78711: 40 Code of Federal Regulations §§124.8(b), 124.10(c)(1)(viii), 124.10(d), and 146.8(d). Where the word "director" is used in the adopted federal regulations, it should be interpreted to mean "commission."

(l) Effective date. This section becomes effective upon approval of the commission's Class III Underground Injection Control (UIC) Program for brine mining injection wells by the United States Environmental Protection Agency under the Safe Drinking Act, §1422 (42 United States Code §300h-1).

§3.85. Manifest To Accompany Each Transport of Liquid Hydrocarbons by Vehicle.

(a) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cargo manifest--One or more documents that together contain the information required by subsection (c) of this section. That part of a manifest which contains information unique to the particular transport being described (such as date and time of removal) must be part of a book, tablet, or series, wherein the documents are sequentially numbered.

(2) Commission--The Railroad Commission of Texas.

(3) Facility--Any place used to store, process, refine, reclaim, dispose of, or treat liquid hydrocarbons.

(4) Lease--A well producing oil, gas, or oil and gas, and any group of contiguous wells producing oil, gas, or oil and gas of any number operated as a producing unit.

(5) Liquid hydrocarbons--Unrefined oil or condensate, and refined oil or condensate to be blended with unrefined liquid hydrocarbons.

(6) Oil tanker vehicle--A motor vehicle licensed for highway use on a public highway or used on a public highway:

(A) that is equipped with, carrying, pulling, or otherwise transporting an assembly, compartment, tank, or other container that is used for transporting, hauling, or delivering liquids; and

(B) that is being used to transport liquid hydrocarbons on a public highway.

(7) Public highway--A way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel, even if the way or place is temporarily closed for the purpose of construction, maintenance, or repair.

(8) Transporter--Each gatherer, storer, or other handler of liquid hydrocarbons who moves or transports those liquid hydrocarbons by truck or other motor vehicle, provided however, that the provisions of this rule do not apply to:

(A) common carriers as defined in the Natural Resources Code, Chapter 111; or

(B) the movement of salt water, brine, sludge, drilling mud, or other liquid or semiliquid material if the commission has authorized the entity to move such material and such material contains less than 7.0% liquid hydrocarbon, by volume, or if not authorized by the commission, the movement is not for hire and the material moved does not contain more than 7.0% liquid hydrocarbons by volume.

(b) A cargo manifest must be carried in each oil tanker vehicle transporting liquid hydrocarbons on a public highway in this state and must be presented on request for inspection as provided by subsection (f) of this section.

(c) For each load of liquid hydrocarbons loaded onto and transported by an oil tanker vehicle, the cargo manifest must include:

(1) an identification of the lease or facility from which the liquid hydrocarbons were removed, which must include:

(A) the lease or facility name; and

(B) the name of the operator of the lease or facility;

(2) the total quantity of liquid hydrocarbons removed from the lease or facility and loaded onto the oil tanker vehicle; provided that for purposes of indicating quantity on the copy of the manifest left with the lease operator, top and bottom gauges will suffice. On the other copies, an estimate in barrels must be included;

(3) the date and hour when the liquid hydrocarbons were removed from the lease or facility and loaded onto the oil tanker vehicle;

(4) the identity of the transporter which must include;

(A) the company or individual transporter's name and address;

(B) the oil tanker vehicle driver's name; and

(C) a unique number for the oil tanker vehicle that for a truck tractor and semitrailer type oil tanker vehicle must include unique vehicle numbers for both truck tractor and semitrailer; and

(5) the intended point of destination for the liquid hydrocarbons, including the name of the receiving facility.

(d) Copy of manifest to be left at the lease.

(1) A copy of the cargo manifest must be left at the lease or facility from which the liquid hydrocarbons were removed or delivered to the lease or facility operator, his agent, or his representative.

(2) The requirements of this section may be met by leaving a separate document at the lease or facility from which the liquid hydrocarbons were removed or by delivering to the lease or facility operator a separate document that includes information required under subsection (c)(1)-(3) and (4)(A) and (B) this section.

(3) If more than one load of liquid hydrocarbons is removed from a single tank or other container of liquid hydrocarbons within a period of 24 consecutive hours, subsection (c)(2) and (3) of this section

may be met for purposes of this section by a separate document that includes:

(A) the total quantity of liquid hydrocarbons removed;

(B) the date and hour the first load was removed; and

(C) the date and hour the last load was removed.

(4) If the operator of a facility requires that a transporter leave at the facility or deliver to the operator a document other than the transporter's cargo manifest, a transporter may meet the requirements of this section by leaving those specified documents at an agreed location or delivering the document to the operator.

(e) After the delivery of all liquid hydrocarbons in an oil tanker vehicle is completed, the cargo manifest must be maintained in the records of the transporter for a period of not less than two years from the date the liquid hydrocarbons are removed from the oil tanker vehicle.

(f) Upon request from a commission agent or other law enforcement official the transporter must produce the cargo manifest for inspection immediately, whether it is on an oil tanker vehicle or in the records of the transporter. Copies of cargo manifests must be filed with the commission, upon request from the commission.

(g) Companies or individuals who do not have organization reports (Form P-5) on file with the Railroad Commission, as required by §3.1 of this title (relating to Organization Report; Retention of Records; Notice Requirement (commonly referred to as Statewide Rule 1)), may not issue cargo manifests.

(h) Every truck or other vehicle covered by this section shall bear on both sides thereof the name of the company or individual responsible for such transportation, the number of the vehicle, and the number of the certificate or permit authorizing the service. In the case of vehicles not for hire, this number shall be the company's organizational report (P-5) number. The identifying signs shall be printed in letters not less than two inches in height, in sharp color contrast to the background, and shall be plainly legible for a distance of at least 50 feet.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2003.

TRD-200304756
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: August 25, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 475-1295

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16 TAC §§3.65 - 3.67, 3.69, 3.72, 3.75, 3.77

The Commission adopts the repeals pursuant to Texas Natural Resources Code, §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells and persons owning or operating pipelines in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction and pursuant to Texas Natural Resources Code §§85.042, 85.202, 86.041 and 86.042 which require the Commission to adopt rules to control waste of oil and gas.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 85.024, 85.202, 86.041, and 86.042.

Cross-reference to statute: Texas Natural Resources Code, §§81.051 and 81.052 and §§85.042, 85.202, 86.041 and 86.042.

Issued in Austin, Texas, on August 5, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2003.

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CHAPTER 8. PIPELINE SAFETY REGULATIONS

SUBCHAPTER B. REQUIREMENTS FOR NATURAL GAS AND HAZARDOUS LIQUIDS PIPELINES

16 TAC §8.101

The Railroad Commission of Texas adopts amendments to §8.101, relating to Pipeline Integrity Assessment and Management Plans for Natural Gas and Hazardous Liquids Pipelines, without changes to the proposal published in the March 28, 2003, issue of the *Texas Register* (28 TexReg 2679). As amended, §8.101 provides an alternative means for approval of the use of direct assessment by hazardous liquids and natural gas pipeline operators as an assessment tool. Previously, §8.101(b)(1) required that a hearing be held in all instances in which a pipeline operator's integrity assessment plan lists direct assessment or other methods of assessment not specifically listed in the rule as the assessment methodology. Proposed new §8.103 set forth procedures for reviewing operators' requests for approval of direct assessment and other technology options listed in §8.101(b)(1). The Commission does not adopt proposed new §8.103 and withdraws the proposal.

In April 2001, the Commission adopted §8.101, which requires all natural gas and hazardous liquids pipeline operators to develop an integrity assessment and management plan for their pipeline systems. In §8.101(b)(1)(C), the rule listed four different assessment tools available to operators to assess the integrity of their pipelines. Of the four assessment tools listed, two--direct assessment and other technology or assessment methodology not specifically listed--required a hearing and Commission approval prior to their use. To date, there have been no hearings on the direct assessment or other new technology methods. The Commission amends §8.101(b)(1)(C) to remove the mandate for a hearing when an operator requests approval of direct assessment or other technology options not specifically listed in

§8.101(b)(1). Such requests would still require the approval of the Commission. The amendment will provide each operator the opportunity for a hearing, if needed, but does not mandate that a hearing be conducted. Commission approval of a direct assessment methodology could be achieved by an order of the Commission without a hearing. Under the adopted amendment, Pipeline Safety staff would work with the operators to review requests for approval of direct assessment plans and, upon the concurrence of both the operator and the Pipeline Safety staff, would present to the Commission a recommendation of approval of the assessment methodology in the form of an agreed order. If an operator and Pipeline Safety staff could not reach an agreement regarding the method or methods of assessment, the operator would have had an opportunity to request a hearing as provided in proposed new §8.103.

New §8.103 was intended to provide specific procedural guidelines for operators and staff in applying for and reviewing requests for approval of direct assessment or other assessment methodology not specifically listed in §8.101(b)(1)(C) and, if necessary, in conducting any hearing that might be convened.

The Commission received six written comments on the proposal from Atmos Energy (Atmos), Air Products and Chemicals, Inc. (Air Products), Texas Oil & Gas Association (TxOGA), the Association of Texas Intrastate Natural Gas Pipelines (ATINGP), Houston Pipe Line Company (HPL), and TXU Gas Company and TXU Fuel Company (TXU), jointly, and one oral comment from an attorney practicing before the Commission.

The two comments from associations expressed agreement with the proposed amendment to §8.101 to remove the requirement that a hearing be conducted in every application for approval of direct assessment. One association was generally in agreement with proposed new §8.103 but expressed disagreement or requested clarification with respect to specific elements of the rule. The other association opposed new §8.103 as premature.

Each of the commenters supported the adoption of §8.101 without any changes. TXU's comments lauded the ability of pipeline operators to discuss various technical issues with the Commission's Pipeline Safety Section staff in an informal setting that promotes the free and easy exchange of information, contrasted to the formal processes attendant to an evidentiary hearing that often inhibits the open dialogue necessary for full understanding of a new methodology. The proposed approach promotes the integration of suggestions from the Pipeline Safety Staff into new methodologies, resulting in improvements.

Atmos' comment suggested the Commission allow an additional year for operators to have direct assessment plans approved by the Commission. The Commission did not propose an amendment to the deadline for submitting baseline assessments. Operators may, however, apply and receive approval for direct assessment methods for assessments beyond their baseline assessments.

Air Products also supports the recommended changes to §8.101 without revision and feels the efforts conducted so far by both the Commission staff and Air Products have been effective in the process to approve direct assessment methodologies. HPL, while supporting §8.101, expressed concern over the wording in §8.103. Houston Pipeline asked that we consider the comments submitted by TxOGA and ATINGP, with which HPL agrees.

TXU's comments support the changes made to §8.101, but additionally urge the Commission to consider treating direct assessment as a basic assessment method similar to in-line inspection and pressure testing without Commission approval. TXU's rationale is to make the Commission rules similar to the federal requirements found in the Pipeline Safety Improvement Act of 2002.

TXU opposed adoption of §8.103 as proposed and expressed concerns about the language in §8.103. In TXU's opinion, the informal procedures currently in use by the Pipeline Safety staff adequately address the items covered by the rule, and no formal procedures are necessary. TXU observed that it would be appropriate to remain silent on procedures for review, but in the event that the Commission adopts a procedural rule, offered language to replace §8.103.

The oral comment from an attorney practicing before the Commission generally supported adoption of §8.103 as proposed, observing that it was a useful reference for operators in crafting applications for approval of direct assessment, guidance that was lacking until now or had to be obtained by calling or writing Commission staff.

ATINGP also supported the adoption of changes to §8.101, but opposed adoption of §8.103 as premature. ATINGP commented that the rule is too inflexible and there may be alternative approaches to resolve the procedural issues addressed in §8.103. ATINGP suggested that procedural issues can better be handled through a prehearing conference which could establish a procedural schedule as well as resolve outstanding issues. By holding a prehearing conference, the stage would be set if there is the need for a formal hearing.

TxOGA submitted comments in support of the proposed amendments to §8.101, and provided general support of proposed new §8.103; however, TxOGA did identify several concerns with specific portions of new §8.103. Specifically, TxOGA suggested that §8.103(c) does not clearly address the approval process for administrative approval of the integrity assessment tools. HPL also observed that the rule is not clear with respect to administrative approval processes.

TxOGA also questioned the requirement in §8.103(c) for providing the number of miles in the system, suggesting that the information is already available through the T-4 permit and/or the integrity management plan and that the information request is not appropriate as part of the direct assessment review.

TxOGA sought clarification regarding the requirements in §8.103(c)(4), which requires information regarding the availability of previous test data on pipeline facilities.

TxOGA requested clarification on proposed §8.103(c)(5), concerning the request for risk factors used in the integrity risk model. TxOGA specifically requested clarification as to whether the Commission is requesting a matrix or the actual data for the segments.

In §8.103(c)(7), TxOGA questioned the clarity of the rule in its requirement for validation data. TxOGA suggested that the Commission include more specific information to clarify this section in order to determine what is actually required as sample verification data.

TxOGA requested clarification of the Commission's intent with respect to the language in §8.103(g) and suggested the Commission include provisions for division administrative reviews under §8.103(d).

The Commission agrees that proposed new §8.103 is premature and declines to adopt it; the proposal is withdrawn.

The Commission adopts the amendment to §8.101 pursuant to Texas Natural Resources Code, §§117.001-117.101, which authorize the Commission to adopt safety standards and practices applicable to the transportation of hazardous liquids and carbon dioxide and associated pipeline facilities within Texas to the maximum degrees permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §60101, et seq.; and Texas Utilities Code, §§121.201-121.210, which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §60101, et seq.

Statutory authority: Texas Natural Resources Code, §§117.001-117.101; and Texas Utilities Code, §§121.201-121.210.

Cross-reference to sections affected: Texas Natural Resources Code, §§117.001-117.101; and Texas Utilities Code, §§121.201-121.210.

Issued in Austin, Texas, on August 5, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 5, 2003.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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CHAPTER 9. LP-GAS SAFETY RULES
SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §§9.2, 9.9, 9.51 - 9.54

The Railroad Commission of Texas (Commission) adopts amendments to §§9.2, 9.9, and 9.51-9.54, relating to Definitions; Requirements for Certificate Renewal; General Requirements for Training and Continuing Education; Training and Continuing Education Courses; Continuing Education Credit for Previous Courses; and Commission-Approved Outside Instructors, without changes to the versions published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4789). The main purpose of this rulemaking is to update the rules to reflect new courses that have been added to the Commission's training and continuing education curriculum, to add new categories of certificate holders who will be required to complete training and continuing education, and to increase the annual examination renewal fee in §9.9 from $25 to $35.

In §9.2, the Commission adds new definitions for "AFT materials," "applicant" and "certificate holder"; revises the definition of "CETP" to reflect the recent transfer of ownership of that program from the National Propane Gas Association to the Propane Education and Research Council; revises the definition of "outside instructor" to clarify that classes taught by approved outside instructors may be presented for Railroad Commission training credit as well as for continuing education credit; clarifies the definition of "training"; and renumbers the remaining definitions. The three new definitions are for clarification and do not substantively change current Commission policies or procedures.

Section 9.9(c) includes the increase in the annual certificate renewal fee from $25 to $35. This fee is the primary source of funding for the training and continuing education program for the approximately 10,000 LP-gas certificate holders. The $10 increase will cover about $100,000 of the approximately $135,700 of general revenue that was available for training and continuing education in the 2002-2003 biennium but will not be available in the 2004-2005 biennium. The Commission plans to make up the approximately $35,700 difference through grants or cost savings. Other new language in §9.9(c) expressly states that governmental employees do not have to pay this fee and, in subsection (c)(1), clarifies the dates of the two-year period during which an individual whose certification has lapsed may pay a late-filing fee instead of complying with the requirements for a new certificate. Other clarifying language in subsection (d) regards lapsed certifications.

Throughout §§9.51-9.54, some non-substantive changes have been adopted, mainly with regard to the use of the word "course." The Commission will use the word "course" to refer to each individual course of instruction included in the Commission's curriculum. The Commission will use the word "class" to refer to a particular session held at a specific time and place.

The Commission adopts substantive amendments in §9.51(b) regarding failure to comply with a training or continuing education requirement by an assigned deadline and the payment of late-filing fees. In subsection (b)(1), the Commission extends the training and continuing education requirements to Category D, F, G, J, and K applicants and certificate holders. Categories D, F, G, J, and K are being added to the currently covered Category E and Category I to increase public safety by training approximately 400 additional individuals whose jobs require them to handle propane in Texas. The Commission has increased the number and types of courses offered in its training and continuing education program to accommodate certificate holders in these additional categories.

In §9.51(d), the Commission adopts new language to clarify that an individual who is required to pay a fee for a class may not receive credit for the class until the fee is paid in full.

In §9.51(e), the Commission updates class schedules on its web site monthly, rather than twice a year, to ensure that current schedule information is available timely.

In §9.51(f)(1), the Commission deletes the requirement that registration forms be filed with the AFRED training section at least seven calendar days prior to a class. The Commission would rather have the classes be well attended, instead of having vacancies in a class because an individual was late in getting the registration form to the Commission. Also in subsection (f)(1), the Commission has added to the required registration information the registrant's level and category of certification, to ensure that applicants and certified individuals register for a course that will confer Railroad Commission training or continuing education credit. In subsection (f)(2)(A), Categories F and G are added to Category I, currently in the rule, in the references to the 16-hour required course of instruction. New language is also adopted with regard to eight-hour and 80-hour classes. New subparagraph (B) clarifies that the class fee does not include the rules

examination fee or the license fee. Also, a new sentence in subparagraph (C) states that current certificate holders who have paid the annual renewal fee and who want to add a new certification other than a Category E, F, G, or I shall not be required to pay the $75 class fee. In subsection (f)(2)(B), the Commission has deleted the reference to courses P115, P116, and P117, which are no longer offered.

In §9.51(f)(2), the Commission adds new subparagraph (E) to allow individuals or governmental subdivisions to request that the Commission conduct a non-credit course and authorize the Commission to do so if an instructor is available to teach the requested course and enough students have registered. The new language also establishes the fees for such courses.

In subsection (f)(3), the Commission has added language to clarify its current practices when registering individuals for classes. The language clarifies that priority for registering in eight-hour classes will be given to individuals whose renewal deadline is the soonest, and priority for registering in 16-hour and 80-hour classes is based on the date the course fee is paid. Other new language allows the AFRED training section to reschedule individuals who were registered for a class that was cancelled.

Other changes in §9.51 are non-substantive and involve changes in wording, organization, or punctuation for clarity.

In §9.52(a), the Commission has added the same categories added in §9.51(b)(1). New wording specifically states that Category E applicants shall attend the 80-hour course; Categories F, G, and I applicants shall attend the 16-hour course; and all other applicants shall attend an eight-hour course. The corresponding new categories are also added to subsection (a)(1), with one exception: New subsection (a)(1)(K) includes appliance service and installation employee-level applicants. This group was already included in the rules, but was not listed in subsection (a)(1), and is added now for clarification. Another clarification in subsection (a)(3) adds a reference to AFT requirements, and in subsection (a)(4) the cross-reference to §9.17 is corrected from subsection (e) to subsection (g).

Current §9.52(b) specifies how the Commission phased in the continuing education requirements for certificate holders when this rule was first adopted in February 2001 and amended in May 2001 by assigning renewal dates randomly over the following four years. This random assignment was necessary in order for the Commission's training staff to train the approximately 10,000 certificate holders in existence at that time. Now that this initial random assignment has taken place, the language in subsection (b)(1) is deleted because it is no longer necessary. New language in subsection (b) clarifies how the four-year continuing education deadline date will be determined. Language is also added to subsection (b)(1)(A) to add the same new categories that were added in subsection (a)(1) of this rule.

In a substantive amendment, new §9.52(b)(1)(B) specifies May 31, 2005, as the deadline for current Category D, F, G, J, and K certificate holders who hold only one certification as of the effective date of these amendments to complete their continuing education requirement. Current Category D, F, G, J, and K certificate holders who hold more than one certification as of the effective date of these amendments shall complete their continuing education requirement by their current assigned continuing education deadline. In paragraph (3), a new sentence clearly states that governmental employees are not required to pay the annual certificate renewal fee.

New §9.52(c) clarifies that the Commission's Train-the-Trainer classes do not count for training or continuing education credit. This wording clarifies that Category D or E certificate holders who are approved outside instructors must comply with all course requirements for each of those activities and may not receive "double credit" for one course.

Section 9.52(f) deals with advanced field training (AFT). The Commission adopts some clarifying amendments and deletes the requirements that completed AFT certification paperwork be submitted to the Commission. The Commission requires the AFT to be properly completed within 30 calendar days of attending a class. All of the qualification tasks must be completed, including the AFT qualification checklist. Completed AFT materials, including the certification page, must be retained and readily available for inspection by an authorized person at a licensee's business location in Texas. In paragraph (1), new wording states that the responsibility for certifying AFT shall not be delegated to an unauthorized individual. New paragraph (2) illustrates different scenarios related to the retention of AFT materials and clarifies who is responsible for keeping the AFT materials. Additionally, the text will clarify that all the performance tasks in the AFT certificate must be completed. In paragraph (3), renumbered from (2), Categories F and G are added to Category I with respect to required completion of the 16-hour management course.

Existing subsection (f) regarding computer-based continuing education courses is repealed. The Commission wishes to avoid the cost of updating its current computer-based courses in light of the recent decline in usage. However, as specified in §9.53(2), the Commission will continue to award credit for computer-based courses through September 1, 2003.

The Commission adopts some substantive changes in §9.52(g) to divide into four tables the current single table that lists each course offered and specifies which certificate holders may complete that course for training or continuing education credit. The four-table format is more specific and better organized. With the addition of Categories D, F, G, J, and K to the training and continuing education program, the information in the tables has been expanded to include those categories. In particular, the changes are as follows:

1. Dates have been added following the title of each table. As the tables are revised in future rulemakings, the date will be changed to a "Revision" date.

2. The Commission has added the following new courses indicated on Tables 1 and 2: 2.2/2.4, Inspecting, Requalifying, Filling and Transporting DOT Cylinders; and Evacuating, Transporting, Maintaining and Refitting ASME Tanks; 3.1, Residential Propane System Layout and Design; 3.2, Residential Propane System Installation; 3.7, Electrical Troubleshooting and Repairing Residential Gas Appliances; 3.11, Residential Propane System Inspection; and 6.1, Regulatory Compliance.

3. The first table, entitled "LP-Gas Management-Level Training and Continuing Education Courses," includes Categories D, E, F, G, I, J, and K management-level courses, course numbers, hours, and titles, and indicates whether AFT is included. An "x" in the row for a particular course indicates the course is approved for the corresponding license category. For example, a Category D management-level applicant or certificate holder who will be required to attend training or continuing education may take course 1.1, 3.1, 3.2, 3.5, 3.7, 3.11, or the 80-hour course.

4. Table 2, entitled "LP-Gas Employee-Level Training and Continuing Education Courses," lists employee-level courses. As compared to the current table in §9.52, in the segment of the table entitled "Railroad Commission Training and Continuing Education Courses Available After September 1, 1997," some courses have been eliminated and some courses have been added. The following courses will no longer be offered: P109A, Appliance Installation; P113A, Appliance Service Persons Overview; P115, GAS Check (3 days); P116, GAS Check (2 days); P117, GAS Check (self-study); P120, Bulk Plant Management; P121, Propane Distribution Systems; and P122, Residential Systems Safety Inspection--Appliances and Exterior. These courses do not appear on any of the new tables.

5. In Table 3, entitled "Courses Which Count Towards Continuing Education Credit For Management-Level Certificate Holders," and Table 4, entitled "Courses Which Count Towards Continuing Education Credit For Employee-Level Applicants or Certificate Holders," the Propane Education and Research Council's (PERC) GAS Check course (formerly offered by the National Propane Gas Association (NPGA)) has been added. The two tables are divided to show which courses apply to management-level certificate holders and which courses apply to employee-level certificate holders.

Section 9.53 covers continuing education credit for previous courses. This section was originally adopted to allow certificate holders who had taken Commission courses prior to the establishment of the training and continuing education program to receive credit for those courses in certain instances. Only non- substantive changes are adopted in this rule, namely, a clarification of the random assignment of initial due dates as previously discussed in the corresponding amendment to §9.52(b). In paragraph (2), the date of September 1, 2003, is added to indicate the date on which credit will no longer be given for completing the Commission's current computer-based courses.

Section 9.54 covers the requirements for Commission-approved outside instructors. In subsection (a)(1), the Commission adds that outside instructors may also offer training classes for specified management-level and employee-level applicants, as well as continuing education for current certificate holders. New subparagraphs (A) and (B) add that Category D certificate holders may also become outside instructors and clarify what courses may be offered by a Category D or Category E outside instructor. Subsection (b) also includes some nonsubstantive new language regarding the outside instructor application process for Category D.

In subsection (h), the Commission adopts a new Train-the-Trainer refresher course that outside instructors must attend prior to their next renewal deadline. The new refresher course replaces the previous requirement that an outside instructor must teach at least one course each year to maintain certification as an outside instructor and will help ensure that outside instructors know current rules and requirements. As with the language in §9.52(c), new language in §9.54(j)(1) states that the Train-the-Trainer class will not count towards a Category D or E applicant's or certificate holder's training or continuing education requirement.

The Commission simultaneously adopts the review and readoption of §§9.2, 9.9, and 9.51 - 9.54 in accordance with Texas Government Code, §2001.039. The notice of adopted review will be filed with the *Texas Register* concurrently with this adoption.

The Commission received one comment on the proposed amendments, from the Texas Propane Gas Association (TPGA). TPGA's comment was directed specifically to the proposed $10 increase in the annual renewal fee, from $25 to $35, in §9.9(c). Rather than increase this fee, representing approximately $100,000 in additional revenue, TPGA suggested that the Commission decrease staff and expenses to align both with current appropriations, and further suggested that a thorough audit review of the entire training program must be completed prior to any approval of a fee increase.

The Commission does not agree with TPGA's comments and suggestions. First, the fee increase is necessary to make up the loss of general revenue appropriations that occurred in the 78th Legislature. Because there has been no decrease in the LP-gas industry's demand for Commission training and continuing education courses and classes, reducing staff would impair the ability of the Commission to deliver propane safety training that benefits both the industry and its customers, as well as the general public.

Second, the Commission's financial operations are audited, as required by state law, and scrutinized by several entities: the Commission's internal audit function; the State Auditor's Office; the Comptroller of Public Accounts; the Legislative Budget Board; the Governor's Budget Office; and the Sunset Advisory Commission. The Commission does not agree that an additional audit is necessary.

The Commission adopts the amendments under the Texas Natural Resources Code, §113.051, which authorizes the Commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public.

Statutory authority: Texas Natural Resources Code, §113.051

Cross-reference to statute: Texas Natural Resources Code, §113.051

Issued in Austin, Texas, on August 5, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. BINGO REGULATION AND TAX

16 TAC §402.555

The Texas Lottery Commission adopts the repeal of 16 TAC §402.555, relating to card-minding device without changes to

the proposal as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4506). The rule set out requirements for the manufacture, distribution, and use of card-minding devices at bingo premises. Contemporaneous with the repeal of this section, the Commission is adopting new 16 TAC §402.555 relating to card-minding systems because the changes are so substantial that it is less confusing to the reader of the rule to adopt a new rule.

A written comment was received regarding repeal of this section.

The commenter is opposed to the repeal of this rule and indicated he wanted to keep this rule instead of adopting the new rule.

The commission disagrees with the comment. Since 1995, when the use of card-minding devices was initially authorized, there have been changes in technology relating to card-minding systems as well as changes in agency procedures. These changes are not addressed in the existing rule. For example, the existing rule does not provide for definitions, current information related to requirements for submitting a card-minding system to the agency for testing, or current information relating to licensed authorized organization requirements. Further, the existing rule does not address the issues and concerns raised by the industry representatives that were a part of drafting the language of the proposed new rule. Finally, there are provisions in the proposed new rule that will further enhance the agency's ability to exercise strict control and close supervision over all bingo conducted in this state as required by the Bingo Enabling Act. For example, the proposed new rule contains provisions requiring the security of a card-minding device's internal accounting system, the prevention of unauthorized access to approved software programs, the prevention of the awarding of unauthorized bingo prizes or access to unauthorized bingo card faces and better record keeping requirements.

Fort Worth Judo Club is opposed to the repeal of the existing rule. No other group or association indicated opposition to the repeal of the existing rule. No other group or association indicated support for the repeal.

The repeal is adopted under the Government Code, §467.102 and the Occupations Code, §2001.054 which provide the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The proposed repeal implements Occupations Code, Chapter 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5113

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16 TAC §402.555

The Texas Lottery Commission adopts new 16 TAC §402.555, relating to card-minding systems with changes to the proposed text as published in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4506). One change is made to comply with legislation, House Bill 2519, 78th Legislature, Regular Session that repealed the limitation on the use of card-minding devices to not more than 40% of the individuals attending a bingo occasion. Specifically, Subsection (f)(1) and (2) as proposed are deleted. Subsection (f)(3) and (4) are renumbered accordingly. The other change is made in response to comments received. The change deletes subsection (i)(3). This subsection which prohibits a licensed authorized organization from requiring a player to use a card-minding device in a game of bingo. Subsection (i)(4), (5), and (6) are renumbered accordingly. Additionally, the word "quantity" in subsection (h)(2)(B) and (4)(B) is changed to the word "number." Finally, the definitions in subsection (a) have been put in alphabetical order and therefore, the paragraphs corresponding to each definition have been renumbered.

Since 1995, when the use of card-minding devices was initially authorized, there have been changes in technology relating to card-minding systems as well as changes in agency procedures. These changes are not addressed in the existing rule that is being repealed concurrently with the adoption of this rule. For example, the existing rule does not provide for definitions, current information related to requirements for submitting a card-minding system to the agency for testing, or current information relating to licensed authorized organization requirements. Further, the existing rule does not address the issues and concerns raised by the industry representatives that were a part of drafting the language of the proposed new rule. The new rule sets out definitions of words and phrases used throughout the rule, the process to obtain commission approval for use of a card-minding system and components, the manufacturing requirements of a card-minding system for approval in Texas, distributor requirements, licensed authorized organization requirements, inspections by the commission, records requirements, and restrictions on the use of a card-minding system in Texas. Additionally, the new section clarifies and expands upon the requirements for manufacturers, distributors, and licensed authorized organizations that are involved with card-minding systems and further enhances the agency's ability to exercise strict control and close supervision over all bingo conducted in this state as required by the Bingo Enabling Act. For example, the rule contains provisions requiring the security of a card-minding device's internal accounting system, the prevention of unauthorized access to approved software programs, the prevention of the awarding of unauthorized bingo prizes or access to unauthorized bingo card faces and better record keeping requirements. The commission adopts the new rule rather than amend the existing rule because the changes are so substantial that it is less confusing to the reader of the rule to adopt a new rule.

Written comments were received regarding adoption of this new section.

Several commenters submitted comments after the comment period and therefore, were not considered.

Several commenters suggested the removal of proposed subsection (f)(1) and (2) because recently enacted legislation eliminates the requirements imposed by the proposed subsection.

Agency response: The commission agrees with the comment. Proposed subsection (f)(1) and (2) were deleted.

One commenter offered the following comment:

The commenter suggested removing subsection (i)(3) because recently enacted legislation repealing the 40% limitation of card-minding device use is consistent with the recent legislative action and that marketing decisions should be left up to individual authorized operators.

Agency response: The commission agrees with the comments. Proposed subsection (i)(3) was deleted as a result of the comment.

The commenter also suggested revising subsection (a)(4) to clarify that peripheral games are games other than bingo games that are approved by the commission.

Agency response: The commission disagrees with the comment. The commission believes subsection (a)(4) is clear that peripheral games, by their very nature, do not include bingo games. Peripheral games are games other than bingo.

The commenter also recommended revised language to proposed subsection (c)(1)(B) to allow for prompt replacement of components due to unforeseen equipment failures that do not inordinately affect the testing schedule.

Agency response: The commission disagrees because current agency practice is to allow changes of hardware that fail and preclude the continuation of the testing. By inserting this wording, the decision of whether to replace failed hardware during testing is no longer at the discretion of the Commission.

The commenter also suggested that subsection (c)(1)(C)(iii) concerning changes to secondary components provide for prompt consideration of any request to replace secondary components since the replacement of secondary components (printers, charging racks, etc.) often need to be made on very short notice.

Agency response: The commission disagrees. Effort is made by the commission to address changes in a timely manner. However, time requirements should not be mandated due to the importance of thorough testing in order to maintain the integrity of all submissions. The commission must have the latitude to take the time it needs for thorough testing without a generic time line that may not be applicable, from a practical perspective.

The commenter also suggested revising proposed subsection (d)(10) to clarify that proper verification procedures approved by the commission must be used when awarding a bingo prize.

Agency response: The commission disagrees because the verification process is not the only method by which manufacturers are ensuring that bingo prizes are being awarded correctly. While the inclusion of this language might clarify verification procedures, this would be a requirement placed upon the conductor.

The commenter also suggested revising proposed subsection (i)(4) so that a manufacturer, distributor, or licensed authorized organization is required to immediately notify the commission of any problem affecting the integrity of the bingo game, but allow the system to remain in use or play. The commenter suggests the commission, rather than these other parties, who may have differing views of a situation, should determine whether a card-minding system should be removed from use.

Agency response: The commission disagrees with the comment. The action prescribed in subsection (i)(4) for a manufacturer, distributor, or licensed authorized organization remains the most cautious approach to issues affecting the integrity of the system. If a system has an issue that initiates a call to the commission, the system should not be used until the Commission is fully informed of the problem and is apprised of the possible solution.

Another commenter offered the following comment:

The commenter suggested revising subsection (a)(1) by substituting the phrase "may be" for the word "is" regarding interfacing with or connecting to equipment used to conduct a game of bingo not all card-minding systems require interfacing with the bingo blower. Only systems utilizing proprietary card sets would require interfacing with a blower.

Agency response: The commission disagrees with the comment because no language in subsection (a)(1) requires the card-minding device to be connected to a bingo blower. The items that a card-minding device can be connected to are identified in subsection (a)(1)(B). Since there is no requirement for a card-minding system to be connected to a blower, the comment regarding proprietary card sets is irrelevant.

The commenter also suggested deleting the phrase "custom built or customized single purpose" in describing portable card-minding devices in subsection (a)(1)(A) because electronic devices by their very nature are not single purpose devices. Off the shelf technology will continue to grow in use in the future. Current trends within the bingo industry are to use licensed products.

Agency response: The commission disagrees with the suggestion because while the suggestion may be valid as to fixed base units, the term "custom built or customized single purpose" refers to portable card-minding devices which are custom built for playing bingo.

The commenter also suggested deleting the phrase "caller station verifier" as a part of a Site System and inserting the term "or licensed" in reference to executable software in subsection (a)(1)(B) since many halls already have verification systems, capable of verifying approved paper permutations as well as some electronic representations of those paper perm sets. Only uniquely created electronic permutations should require interfaced verification systems.

Agency response: The commission disagrees with the comment. The caller station verifier is required so that the system is able to communicate with the player's fixed base units or hand held units communicating via radio frequency (RF). The called numbers are sent to the players units so that the players are able to daub them. The caller station verifier also changes the games for these units. The caller station verifier is required so that the system can electronically verify that the daubed pattern constitutes a winning bingo. The caller station verifier will do this by comparing the numbers entered on the caller station verifier with those entered on the card-minding device by the player. The card-minding caller station verifier is able to determine what day, session, and game a particular card face has been sold. Other verifiers cannot do this, because they do not interface with the sales database. With regard to the suggestion to include the phrase "or licensed," the commission believes that once software has been created to be used as part of the card-minding system, it is proprietary. The phrase "or licensed" implies "proprietary" and therefore, the inclusion of the suggested phrase is redundant.

The commenter also suggested the addition of a secondary definition in subsection (a)(7)(B) that would state "Licensed software. Computer software that has been licensed by a manufacturer that is a primary component of the card-minding system and is required for a card-minding device to be used in a game

of bingo." The commenter indicated that the current trend in the bingo industry is for manufacturers to license certain software components for use in their card-minding systems.

Agency response: The commission disagrees with the comment for the reasons previously stated.

The commenter also suggested including the phrase "or portable" in subsection (a)(11) because there is a question as to the consistency of this definition. Some portable devices operate like fixed base units and should be included.

Agency response: The commission disagrees with the comment because this definition was created specifically for fixed base units. The account number is a unique identification number assigned to a fixed base unit. Handheld devices, when loaded by the point of sale device, include the serial number of the device which serves the same identifying purpose for the handheld that the account number serves for the fixed base unit. Separate language throughout this rule exists for references to the portable units and the fixed base units in order to maintain consistency and eliminate potential confusion.

The commenter also suggested inserting the phrase "or licensed" in reference to executable software and deleting the phrase "including demonstrated except as provided by subsection (i)(6) of this section" in subsection (b)(1), (2), and (3) because keeping the licensed authorized organization informed and apprised on industry developments is of critical importance to the industry.

Agency response: The commission disagrees with the comment regarding the suggestion to include the phrase "or licensed" for the reasons previously stated. Regarding the striking of the language concerning demonstrations, the language in proposed subsection (i)(6) (now subsection (i)(5)) provides the opportunity for manufacturers to demonstrate new developments that have not been approved. The suggestion to strike language that would allow for the demonstration of a non-approved card-minding system is inconsistent with the comment that it is of critical importance to the industry to keep it informed and apprised of industry developments.

The commenter also suggested striking the word "portable" regarding card-minding devices and adding the phrase "or licensed" to software throughout subsection (c)(1).

Agency response: The commission disagrees. The use of separate language for portable card-minding devices in subsection (c)(1) and in other provisions is due to their custom builds and proprietary nature. A portable unit has custom hardware and custom software, and unique serial numbers assigned to it by the manufacturer. Fixed-base units are not separately noted in this section because it is the proprietary software that distinguishes them, while the hardware is not generally proprietary to the manufacturer and can be obtained in the open market.

The commenter also suggested adding the phrase "(other than general purpose consumable batteries)" in subsection (c)(1)(C)(iii) because some devices use readily available general purpose consumable batteries.

Agency response: The commission disagrees because the other language in this section makes it clear that the term "batteries" refers to the battery packs that are proprietary in nature.

The commenter also suggested striking the last sentence "Any and all reports maintained or generated by the card-minding system shall be capable of being downloaded or otherwise accessed via the modem." in subsection (d)(2) because having report generating capability via dialup is extremely difficult, the information or data can be downloaded and reports generated by the identical system retained by the commission.

Agency response: The commission disagrees. This subsection states that the reports can be downloaded, as well as generated over the modem line. The requirement for increased ease in viewing reports and records is needed due to the ever increasing usage of the devices in the halls. The commission is becoming more specific in this requirement and is looking forward to the manufacturers applying greater development in this area in order for the commission to increase its ability to maintain compliance of the card-minding devices. This language was drafted with significant input from industry representatives.

The commenter inquired as to the definition of a bingo card serial number in subsection (d)(3)(A) but did not offer language.

Agency response: The definition is in 16 TAC §402.558(a)(18).

The commenter also inquired as to what the requirement of subsection (d)(3)(D) accomplishes.

Agency response: The language in subsection (d)(3)(D) is intended to help insure the integrity of the card-minding system through improved recordkeeping.

The commenter also suggested inserting ", at any time, by an authorized conducting organization" and the striking of "during the occasion" in subsection (d)(4).

Agency response: The commission disagrees. This change in wording suggests that the conductor of the occasion cannot alter the information, but a distributor or a manufacturer or a representative of distributor or manufacturer would be able to do so. The time frame of "during an occasion" is necessary because the first portion of subsection (d)(4) addresses the security of the information. Once the information is collected during the sales process it should be secure from alteration.

The commenter also suggested the removal of the word "sequential" and the insertion of "unique, session" in regards to point of sale transactions in subsection (d)(5)(C) because having multiple points of sale make sequential numbering difficult.

Agency response: The commission disagrees. The current level of sophistication of the point of sale software makes this a non-issue. Most of the systems that are presented for approval have multiple point of sales and the issue of sequential numbering has not been a problem.

The commenter also suggested the striking of this entire sentence "each card face serial number or range of serial numbers" in subsection (d)(6)(A) because the card-minding systems track each card face serial number sold, but printing each card face number would be overly burdensome, slow down the process and waste paper.

Agency response: The commission disagrees. Current practice has nearly all the manufacturers printing a range of card face serial numbers issued for each game on the receipt.

The commenter also suggested striking the entire phrase "the serial number of each portable card-minding device sold in subsection (d)(6)(B), and adding to (d)(6)(C) the phrase "serial number" and deleting the phrase "fixed base."

Agency response: The commission disagrees. The commission believes the portable card-minding device serial numbers must be included on the receipt because it identifies the product sold

more distinctly and completely for the customers, improves the audit trail, and which further enhances the integrity of the games. The receipt, by its very definition, should identify a transaction completely. The requirement for the information concerning fixed base units presents several options as manufacturers save the sales information differently; therefore, the separate language for fixed base units and portable units was included. The proposed rule was drafted with significant input from industry representatives.

The commenter also suggested rewriting subsection (d)(8) because several card-minding systems utilize paper card permutations for which the hall already has a system to verify and show players the winning card face.

Agency response: The commission disagrees. The suggested changes create a subset of the card-minding systems that do not need to include a verifier if 1) they are played with paper card permutation and 2) if the hall has a verifier that is capable of verifying paper card permutations. All fixed based player stations must have a caller station so that the called numbers can be sent to these units and the players will know which number to daub. It is crucial that the card-minding systems be able to verify the card faces that are sold electronically. Also, almost all the card-minding systems can be made to play any paper card permutation. However, for the most part they do not do so in the halls because 1) they do not want to repeat card faces that are sold as paper faces and 2) they need to use larger card face permutations so that they do not issue the same cards more than once. Therefore they use permutations that are several hundred thousand card faces in size. By including the commenter's suggested language, the commission will have created sets of rules for two different systems plus it will have the added compliance issue to determine if a card-minding system is playing a paper card permutation or has been switched to an electronic permutation.

The commenter also suggested adding the phrase "or licensed" in subsection (d)(9) and indicated that the subsection seems very broad and difficult to interpret.

Agency response: The commission disagrees with the suggestion to include the phrase "or licensed" for the reasons previously stated. The commission also disagrees that the language is either broad or difficult to interpret. The language for this subsection evolved through a group process that included representatives from manufacturers and distributors of card-minding systems. Further, the subsection includes specific examples of acceptable security measures.

The commenter also suggests deleting subsection (d)(10) because it would require continuous communication via a network to all units. It is virtually impossible to ensure that this doesn't happen.

Agency response: The commission disagrees. Based on current practice this is possible by the verifying software reading the sales database and determining if a card face submitted for verification was sold for that particular day, session and game. This is particularly important for portable units that do not communicate via radio frequency signals with the caller station, as they can sometimes be used to play another session if the same set of games is played again. They can also play the wrong game within a session if the two consecutive games have the same winning game patterns and the player fails to advance the portable card-minding device to the next game. Fixed base units and RF portable units are in constant communication with the callers station, and are therefore always in the correct game.

The commenter also suggests rewriting subsection (d)(12) since most devices have the capability to play more cards due to different requirements in other jurisdictions. The device should only need to be able to restrict the amount of cards played.

Agency response: The commission disagrees. The rewording of subsection (d)(12) would not appreciably change the requirements set forth in this rule.

The commenter also suggested removing "and printed on the receipt issued to the player using the card-minding device" in reference to printing the 1-800 toll free problem Gamblers' Help Number on receipts for card-minding devices in subsection (d)(13) because printing on the receipt is redundant because of having the number on the machine itself or near the machine on some type of supporting base.

Agency response: The commission disagrees. However, this could become a moot point as a result of the consequences of recently enacted House Bill 2292 that could eliminate the toll free Gamblers' Help Line.

The commenter also suggested adding the phrase, "or first used" regarding the installation date of card-minding device in subsection (e)(1)(C) because the installation may take multiple days, therefore the first day of actual use may make more sense.

Agency response: The commission disagrees. By using the past tense of the word install, the date required is the date that the installation is complete.

The commenter also suggested inserting the term "or by" in regards to the attachment of the Problem Gamblers' sticker in subsection (f)(3) because in some situations, the most prominent place to attach the Problem Gamblers' sticker may be on an attached unit support base, not the unit itself.

Agency response: The commission disagrees. However, this could become a moot point as a result of House Bill 2292, 78th Legislature, Regular Session that could eliminate the toll free Gamblers' Help Line. This notwithstanding, if the unit support base that is referred to in this comment, is integral to the monitor at the player's station, it is part of the card-minding device.

The commenter also suggested the removal of subsection (h)(1)(B) and the addition of the phrase "model, version, and serial number" to subsection (h)(1)(C) because it makes sense to combine subparagraphs (B) and (C).

Agency response: The commission disagrees. There are different recordkeeping requirements for portable card-minding devices than for fixed-base devices. As a result, the Commission has determined that subsection (h)(1)(B) and (C) should be separate. Subsection (h)(1)(B) addresses information regarding portable card-minding devices that must be maintained by manufacturers while subsection (h)(1)(C) addresses the information regarding fixed-base devices that must be maintained by manufacturers.

The commenter also suggested rewriting subsection (h)(2) because the proposed language does not work under a revenue share model which is commonly utilized in a manufacturer/distributor relationship.

Agency response: The commission disagrees. The commenter's suggested changes would allow for a manufacturer to

sell to another manufacturer, and a distributor to sell to a manufacturer. There is no information provided by the commenter that explains what a revenue share model is and to what extent this type of agreement is used in the market place. Furthermore, any distributor/manufacturer relationship that does not operate on invoices could violate the tier system. This language was drafted with significant input from industry representatives.

The commenter also suggests rewriting subsection (h)(2)(A), (B) and (C).

Agency response: The commission disagrees. These changes remove the basic requirements of any invoice, and an invoice is what is required to denote transactions between manufacturers and distributors.

The commenter also suggested the removal of the word "or distributor" in subsection (h)(4).

Agency response: The commission disagrees. The language change would appear to indicate that sales transactions between distributors should not be allowed.

The commenter also suggested the substitution of the word "amount" in place of "quantity" relating to sold or leased in subsection (h)(4)(B) because not all leases are based on the number of units sold or leased.

Agency response: The commission disagrees. Despite the terms of the lease, the commission still requires that the number of units involved in all transactions be provided so that the commission can verify that all the units at a hall were obtained from licensed distributors. The commission also needs to know how many units are at a hall for the audit process.

The commenter also suggested the insertion of the phrase "terminal number or account number" as it relates to each card-minding device sold and the insertion of "or utilized" as it relates to card-minding device sold in subsection (h)(8)(C).

Agency response: The commission disagrees. Account numbers are not printed on the receipts for security reasons, and terminal numbers are not printed because at the time of the sale it is not known which terminal the player will sign on to play. Card-minding units that are able to be utilized without going through the point of sale and not being registered as a sale are not approved for use in the Texas market.

The commenter also suggested striking subsection (h)(8)(E) because it is overly burdensome and the term "serial number" is undefined.

Agency response: The commission disagrees. The listing of required items in subsection (h)(8) is information that the card-minding systems will print out at the end of every session. The devices already store the issued serial number information in their databases. The commission is asking the manufacturers to include this data with the reports that are printed at the end of a session.

The commenter also suggests adding the phrase "sold if the card minding system is utilized to sell disposable card packages" in subsection (h)(8)(G).

Agency response: The commission disagrees. This information is stored in the database. Furthermore, this information is required for the daily cash reports that the licensed organization is required to maintain. The commenter also suggested the substitution of the word "may" for "must" regarding the requirement in subsection (h)(9) that the point of sale on the card-minding devices be used as the cash register for all sales if a card-minding device was on the premises.

The commenter indicated that the requirement in subsection (h)(9) would be very difficult to accomplish given the crowd movement, and the number of point of sale stations which would be required. Also, the commenter questions how this provision would apply if multiple different card-minding systems are in use at the bingo hall at the same time.

Agency response: The commission disagrees. Currently, in locations where more than one type of card-minding system is in use, paper sales can be made from both systems.

The commenter also suggests the deletion of proposed subsection (i)(6) because keeping the licensed authorized organization informed and apprised on industry developments is of critical importance to the industry.

Agency response: The commission disagrees. This section provides a method by which the manufacturer can demonstrate new developments prior to their approval for use in Texas.

Another commenter is opposed to the adoption of this rule. She further states that there are three areas in particular that causes her problems. The commenter suggests eliminating the rule language stipulating the use of the point of sales features on a card-minding system within the hall because the commenter indicates that the commission does not need to tell her what kind of point of sales system she should use. The commenter believes that as long as she's ringing up her sales on a cash register and following the guidelines set out, that should be sufficient. The commenter believes this provision is the commission dictating what cash register system she can use.

Agency response: The commission disagrees. There are several reasons why subsection (h)(9) was added. The point of sale capabilities provided by the card-minding device are superior to many cash registers currently used in the halls. Apart from electronic devices, these point of sale units have enough keys to record all bingo sales including bingo paper and instant pull-tab bingo tickets. The point of sale stations on the card minding devices are required to have the capacity to retain sales data for at least twelve months. Additionally, more than one point of sale stations can be placed on an electronic card-minder system, and the sales information from all the point of sales is combined on to one database. The point of sale stations also have the capability to generate various sales reports, based on the information that is retained in the database, for use by the charitable organizations. Access to the sales databases are available via modem connections if need be.

The commenter also suggests eliminating rule language that allows a card-minding system to include player tracking software because the commenter questions how fast and easily or at all will the sales and player tracking system be moved. The commenter also questions whether she can keep the player tracking information confidential. The commenter is concerned that "a somewhat shady branch of the bingo industry" would have access to her player list if she chooses to use that feature.

Agency response: The commission disagrees. There is no specific language in the proposed rule that mandates the use of the player tracking software by the conductors. Furthermore, by limiting card-minder use, conductors could have a separate cash register, a separate computer for player tracking software, and separate register for sales of card-minding devices. The

card-minding systems have powerful point of sale stations with numerous capabilities combined into one unit, capabilities which many halls feel would enhance their business.

Another commenter offered the following comment:

The commenter suggested eliminating subsection (a)(1)(B)(5) which contains language defining player tracking software and deleting all references to player tracking software. The system service provider (SSP) should be the only authorized entity to accumulate player tracking data in conjunction with its "accounting for bingo sales, prizes, inventory, prize fees, taxes, report generation and other authorized services as requested by the licensed authorized organization."

Agency response: The commission disagrees. There is no language, either in the Bingo Enabling Act or the rules that is specific to software with player tracker capabilities. All the manufacturers of electronic card-minding devices have developed player tracking software for use with their systems while there is currently not a system service provider's system in use. Due to the absence of system service providers' product and in order to satisfy industry requests for player tracking software, language was included in the rule that defines player tracking software for use in card-minding systems.

The commenter also suggests eliminating subsection (d)(7) which contains language allowing a card-minding system to include player tracking software because the requirements allow a manufacturer the ability to create a completely integrated electronic systems that is currently granted only to a licensed SSP. Any information gathered by the manufacturers should be strictly limited to information related to the sale of electronic bingo to protect the integrity of the game.

Agency response: The commission disagrees. There is no language, either in the Bingo Enabling Act or the rules that provide license exclusivity regarding player tracking to SSPs. The addition of language allowing a card-minding system to include player tracking software was done to fill the need for specific language concerning player tracking software. Furthermore, this inclusion of this language does not prohibit SSPs from developing player tracking software. It is not feasible for the card-minding devices to be limited to information related to the sale of electronic bingo. By limiting their use, conductors could have a separate cash register, a separate computer for player tracking software, and separate register for sales of card-minding devices. The card-minding systems have powerful point of sale stations with numerous capabilities combined into one unit. Capabilities which many halls feel would enhance their business. There is no information provided by the commenter to substantiate that the integrity of the game is in need of protection if player tracking software is allowed to be used with a card-minding device.

The commenter also suggests eliminating subsection (h)(9) which contains language stipulating the use of the point of sale features on a card-minding system within the hall.

Agency response: The commission disagrees. There are several reasons why §402.555(h)(9) was added. The point of sale capabilities provided by the card-minding device are superior to many cash registers currently used in the halls. Apart from electronic devices, these point of sale units have enough keys to record all bingo sales including bingo paper and instant pull-tab bingo tickets. The point of sale stations on the card minding devices are required to have the capacity to retain sales data for at least twelve months. Additionally, more than one point of sale stations can be placed on an electronic card-minder system, and the sales information from all the point of sales is combined on to one database. The point of sale stations also have the capability to generate various sales reports, based on the information that is retained in the database, for use by the charitable organizations. Access to the sales databases are available via modem connections if need be.

Another commenter is opposed to adoption of the rule. The commenter also suggested eliminating language stipulating the use of the point of sale features on a card-minding system within the hall because the commenter does not want to be locked into a certain card-minding device; the commenter wants to have the flexibility to change devices to get a better price. The commenter believes this will not happen if this rule goes through. The commenter indicated that if he has a player tracking list and all of the sales information with a certain card-minder and he decides to switch to another manufacturer's card-minder, he believes it will be difficult to get the information switched. The commenter believes that based on his experience, it will not be an easy transition from one system to another. The commenter also does not want the commission dictating to him that he use a card-minding device to ring up all my sales. The commenter likes the point of sale system he is using now and it's not the one on the card-minding devices he uses.

Agency response: The commission disagrees. The argument the commenter makes is that his use of sales recording devices is price dependent. If that is the case, the commenter would have the same problems he raises when switching from whatever point of sale system he wishes to use now and a lesser priced system in the future. The point of sale capabilities are already part of whatever electronic card-minding system he is currently using, it does not seem feasible to pay for separate cash register if he is concerned about price. There are several reasons why subsection (h)(9) was added. The point of sale capabilities provided by the card-minding device are superior to many cash registers currently used in the halls. Apart from electronic devices, these point of sale units have enough keys to record all bingo sales including bingo paper and instant pull-tab bingo tickets. The point of sale stations on the card minding devices are required to have the capacity to retain sales data for at least twelve months. Additionally, more than one point of sale stations can be placed on an electronic card-minder system, and the sales information from all the point of sales is combined on to one database. The point of sale stations also have the capability to generate various sales reports, based on the information that is retained in the database, for use by the charitable organizations. Access to the sales databases are available via modem connections if need be.

The commenter also suggests a rule that sets a limit on the amount a distributor of a card-minder can charge a charity because he believes the distributors already charge way too much for what he is getting.

Agency response: The commission disagrees. In drafting the language, the commission staff sought the input from all segments of the industry including persons representing conductors.

Groups or associations opposed to the rule: Wichita Falls/The Place and Fort Worth Judo Club. Groups or associations in favor of the rule: While there were groups or associations that provided comment to the rule, these entities did not expressly state support for or opposition to the rule.

The new rule is adopted under Occupations Code, §2001.054 which authorizes the Commission to adopt rules to enforce and

administer the Bingo Enabling Act, under Government Code, §467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction, and under Occupations Code, §2001.051(b) which grants the Commission broad authority to exercise strict control and close supervision over all bingo conducted in Texas so that bingo is fairly conducted and the proceeds derived from bingo are used for an authorized purpose.

The new rule implements Occupations Code, Chapter 2001.

§402.555. Card-Minding Systems.

(a) Definitions. The following words and terms shall have the following meanings unless the context clearly indicates otherwise:

(1) Account Number. The unique identification number, if any, assigned by a card-minding system to a customer that uses a fixed-base card-minding device to play bingo.

(2) Card-minding system. Any electronic or computerized device and related hardware and software that is interfaced with or connected to equipment used to conduct a game of bingo as defined in Occupations Code, §2001.002. A card-minding system consists of the following two parts:

(A) Card-minding device. An electronic or mechanical device, either portable or fixed-base, that is used by a bingo player to mark representations of bingo card faces stored in the device. A portable card-minding device refers to a hand-held, custom-built or customized, single purpose device designed to be used by a player to play bingo. A fixed-base card-minding device refers to a stationary computer on which a manufacturer's proprietary software is used by a player to play bingo. A card-minding device may be designed to be played in conjunction with paper.

(B) Site system. Computer hardware, software, and peripheral equipment, that is located at the bingo premises, is controlled by the licensed authorized organization, and interfaces with, connects with, controls or defines the operational parameters of card-minding devices and must include, but is not limited to, the following components: point of sale station, a caller station verifier, required printers, dial-up modem, proprietary executable software, report generation software and an accounting system and database. All references to and requirements of site systems and card-minding systems throughout this rule shall be applicable to manufacturers of card-minding devices designed to be played with paper, but the function or action required by the rule may be performed in a manner other than electronically.

(3) Checksum or Digital Signature. Methods by which data, as in a software application, is expressed in a calculated number which is used to verify the accuracy of the data or a copy of the data.

(4) Model number. A number designated by the manufacturer that indicates the unique structural design of a portable card-minding device or card-minding system.

(5) Peripheral games. Peripheral games are games that are not prohibited by law, including Occupations Code, §2001.416 and/or do not allow the accumulation or awarding of credits that can be exchanged for anything of value.

(6) Player tracking software. Computer software, located on the card-minding system, that is used to track characteristics of bingo players, including personal data and purchasing habits of players at a bingo hall.

(7) Proprietary software. Custom computer software developed by the manufacturer that is a primary component of the card-minding system and is required for a card-minding device to be used in a game of bingo.

(8) Secondary component. Additional software or hardware components, provided by the manufacturer, that are part of or are connected to a card-minding system that does not affect the conduct of the game of bingo. Secondary components may include computer screen backgrounds, battery charge up software routines, printers, printer software drivers, and charging racks.

(9) Serial number. The unique identification number assigned by a manufacturer to a specific portable card-minding device or other component of a card-minding system.

(10) Software modifications. Alterations to the proprietary software that affects the requirements or restrictions as identified in this rule or Occupations Code, Chapter 2001 while not making substantial changes that affect the previously approved device's proprietary software or hardware platforms.

(11) Terminal number. The unique identification number, if any, assigned by a manufacturer to a specific fixed-base card-minding device.

(12) Version number. A unique number designated by the manufacturer to signify a specific version of software used on or by the card-minding system.

(b) Approval of Card-Minding System Components.

(1) Proprietary software may not be sold, leased, or otherwise furnished, including demonstrated except as provided by subsection (i)(5) of this section, to any person in this state, for use in the conduct of bingo until a card-minding system containing the identical software has first been presented to the commission by its manufacturer, at the manufacturer's expense, and has been approved by the commission for use within the state.

(2) A portable card-minding device may not be sold, leased, or otherwise furnished, including demonstrated except as provided by subsection (i)(5) of this section, to any person in this state, for use in the conduct of bingo until a portable card-minding device which is identical to the card-minding device intended to be sold, leased, or otherwise furnished has first been presented to the commission by its manufacturer, at the manufacturer's expense, and has been approved by the commission for use within the state.

(3) Secondary components, including hardware components of fixed-base card-minding devices and non-proprietary software, may not be sold, leased, or otherwise furnished, including demonstrated except as provided by subsection (i)(5) of this section, to any person in this state, for use in the conduct of bingo unless approved by the commission for use within the state. However, manufacturers may conduct routine maintenance activities and replace secondary components of a card-minding system without prior commission approval as long as this activity does not affect the operation of any proprietary software or the manner in which a bingo game is played.

(4) The commission shall determine whether all proprietary software and portable card-minding devices required to be tested, as well as other components of card-minding systems, conform with the requirements and restrictions contained in the Occupations Code, Chapter 2001 and charitable bingo administrative rules. The decision by the commission to approve or disapprove any component of a card-minding system is administratively final.

(5) A card-minding system may not allow the play or simulate the play of video poker, keno, blackjack or similar games.

(6) Manufacturers may provide any reports and test results conducted or prepared by an independent, third-party testing laboratory with any submission of a card-minding system or modification to

a card-minding system to the commission. The commission may consider the information contained in these reports during the approval process.

(7) A checksum number or digital signature will be obtained from the proprietary software submitted for testing to be used to verify proprietary software compliance at playing locations.

(c) Submission of Card-Minding System Components.

(1) A portable card-minding device that is identical to the portable card-minding device intended to be sold, leased, or otherwise furnished must be presented to the commission in Austin for review and testing by the commission, if the commission determines testing is required. A copy of proprietary software that is identical to the proprietary software intended to be sold, leased, or otherwise furnished must be presented to the commission in Austin for review and testing by the commission, if the commission determines testing is required.

(A) Submissions must include all associated hardware, software, written operating manuals and technical information, to the extent not already in the commission's possession, in order to allow the commission to determine whether the components submitted and the card-minding system that will contain the components complies with the Occupations Code, Chapter 2001 and charitable bingo administrative rules.

(B) Once the manufacturer represents that the card-minding system is ready for testing, no modifications will be allowed to the card-minding system while the testing is in progress. The commission shall either approve or disapprove the submitted card-minding system or component in writing within 45 days unless the commission finds that there is good cause to extend this period for another 45 days.

(C) The manufacturer will be assessed a fee in an amount that is at least sufficient to cover the costs incurred by the division for testing each original submission, resubmission of a disapproved card-minding system or component, and submission of modifications to a previously approved card-minding system. Failure to pay this fee may result in administrative action being taken against the manufacturer.

(i) An original submission shall include, but is not limited to, an entirely new card-minding system, an entirely new component of a card-minding system, including changes to the proprietary software, the point of sale, database, server and card-minding devices that create a version number change.

(ii) Software modifications that require testing and a subsequent fee are alterations to the proprietary software that affects the requirements or restrictions as identified in this rule or Occupations Code, Chapter 2001 while not making substantial changes to previously approved proprietary software or hardware platforms.

(iii) Changes of or to a secondary component, including but not limited to printers, monitors, or batteries, that do not affect the play of the game or the databases and do not affect the requirements or restrictions as identified in this rule are not considered modifications that require testing, but they do require approval by the commission prior to use. The commission retains the right to determine if a change of this type is subject to testing.

(2) The commission must be informed via a written communication of all secondary components of a card-minding system that a manufacturer intends to be sold, leased, or otherwise furnished for use in the conduct of bingo prior to such use.

(3) If granted, approval extends only to the specific card-minding system or component approved. Any modification must be approved by the commission. Any addition of software applications or modifications by anyone other than a licensed manufacturer or its designated representative to an approved electronic card-minding system is prohibited.

(4) Once a card-minding system or component has been approved, the commission may keep the card-minding system or component for further testing and evaluation for as long as the commission deems necessary. The manufacturer shall make provisions to retrieve the card-minding system or component if requested by the commission, at the manufacturer's expense. Failure to do so will result in the manufacturer relinquishing its rights to the system or component and the commission shall dispose of the system or component as it deems appropriate.

(d) Manufacturing Requirements.

(1) A manufacturer of a card-minding device must manufacture each associated site system to include a point of sale station and an internal accounting system that is capable of recording the licensed authorized organization's sale of card-minding devices, disposable bingo cards, and pull-tabs.

(2) A manufacturer of a card-minding device must ensure that the associated site system has dial-up capability, so that the commission may remotely verify the operation, compliance and internal accounting systems of the site system at any time. The manufacturer shall provide to the commission all current protocols, passwords, and any other required information needed to access the system. Any and all reports maintained or generated by the card minding system shall be capable of being downloaded or otherwise accessed via the modem.

(3) A manufacturer of a card-minding device must manufacture each associated site system to ensure that an internal accounting system records and retains for a period of not less than twelve months:

(A) the serial number of each bingo card sold for card-minding device use;

(B) the price of each card or card package sold;

(C) the total amount of the card-minding device sales for each occasion;

(D) the total number of card faces sold for use with card-minding devices for each occasion;

(E) the serial number of each portable electronic card-minding device sold; and

(F) the terminal number or account number associated with each fixed-base card-minding device sold.

(4) The information referenced in paragraph (3) of this subsection must be secure and shall not be accessible for alteration during the occasion. The site system must also have report generation software with the capability to print, for a period of twelve months, all information required to be maintained on the site system's active or archived databases.

(5) A manufacturer of a card-minding device must manufacture each associated site system to ensure that the applicable point of sale station is capable of printing a receipt for each sale or void of an electronic or paper card face product that includes, at a minimum, the following information:

(A) the date and time of the transaction;

(B) the dollar value of the transaction and quantity of associated products;

(C) the sequential transaction number; and

(D) the session in which the product was sold.

(6) A manufacturer of a card-minding device must manufacture each associated site system to ensure that the applicable point of sale station is capable of printing a receipt for each sale or void of an electronic product that includes, at a minimum, the following information in addition to the information in paragraph (5) of this subsection:

(A) each card face serial number or range of serial numbers;

(B) the serial number of each portable card-minding device sold; and

(C) the terminal number or account number for each fixed-base card-minding device sold.

(7) A card-minding system may include player tracking software. Records generated by the use of the player tracking software are subject to review by the commission. The records should be available either at the card-minding system location or retrievable via dial up modem. The records must be maintained for a period of not less than twelve months. Player tracking records shall at all times be the property of the licensed authorized organization and neither the manufacturer nor the distributor shall utilize or make available to any person, other than the commission or as otherwise authorized by law, the information contained within the player tracking software without the express written permission of the licensed authorized organization.

(8) A manufacturer of a card-minding device must manufacture each associated site system to include a caller station verifier that is able to verify winning cards and to print the cards for posting. The caller station verifier must be capable of posting all balls called for verification purposes and print an ordered list of the called balls.

(9) A manufacturer of a card-minding device shall employ sufficient security safeguards in designing and manufacturing the card-minding system such that it may be verified that all proprietary software components are authentic copies of the approved software components and all functioning components of the card-minding system are operating with identical copies of approved software programs. The device must also have sufficient security safeguards so that any restrictions or requirements authorized by the commission or any approved proprietary software are protected from alteration by unauthorized personnel. Examples of security measures that may be employed to comply with these provisions are the use of dongels, digital signature comparison hardware and software, secure boot loaders, encryption, and key and callback password systems.

(10) A manufacturer of a card-minding device shall ensure that the card-minding system does not allow a card-minding device to be used to obtain a bingo prize for any bingo game other than for a game within the bingo occasion for which the card-minding device was sold.

(11) A manufacturer of a card-minding system shall ensure that a card-minding device does not allow any bingo games or card faces other than those purchased by the patron to be available for play.

(12) A manufacturer of a card-minding device shall ensure that a card-minding device is not capable of playing in excess of sixty-six card faces per game.

(13) The toll-free "800" number operated by the Problem Gamblers' Help Line of the Texas Council on Problem and Compulsive Gambling must be displayed on each card-minding device in such a manner that it is conspicuous and clearly visible to a player using the card-minding device or displayed on the screen of the card-minding device in such a manner that it is conspicuous and clearly visible to a player using the card-minding device at all times and printed on the receipt issued to the player using the card-minding device. If labels are placed on the card-minding device, the manufacturer must furnish labels to the distributor. The licensed authorized organization is responsible for the placement of labels on each device.

(e) Distributor Requirements.

(1) Before initial use by a licensed authorized organization, each distributor that leases, sells or otherwise furnishes a card-minding system must notify the commission in writing on a form prescribed by the commission or electronically in a format prescribed by the commission that includes the following information:

(A) the modem number and total number of card-minding devices installed at the bingo premises;

(B) the name of the bingo premises, physical address, telephone number, and licensed commercial lessor's taxpayer identification number, where the card-minding system is located;

(C) the date the card-minding system was installed;

(D) the model, version and serial numbers or terminal numbers of the card-minding devices and site system equipment;

(E) the name, and taxpayer identification number of the licensed authorized organization to whom the card-minding system was sold, leased, or otherwise furnished; and

(F) the name, and taxpayer identification number of the manufacturer or distributor from whom the card-minding system was leased, purchased or otherwise obtained.

(2) Each distributor that leases, sells or otherwise furnishes a card-minding system must notify the commission in writing on a form prescribed by the commission or electronically in a format prescribed by the commission of the make, model and serial or terminal number of each card-minding device that will be utilized at multiple locations. Additionally, if a card-minding device is to be used at more than one bingo premises the following must occur:

(A) each location must have its own separate site system;

(B) the distributor must list all card-minding devices at each bingo premises and must include a separate report indicating at what time and at what playing location the units will be located.

(3) Each distributor that leases, sells or otherwise furnishes a card-minding system must notify the commission in writing on a form prescribed by the commission or electronically in a format prescribed by the commission which will include the same information required in paragraph (1) of this subsection for each card-minding device that is removed or added from a bingo premises on a quarterly basis. Before the complete removal or hardware up-grade of any card-minding system, each licensed authorized distributor must supply a copy of the data files to each licensed authorized organization who utilized the card-minding system.

(4) Each distributor shall provide labels displaying the toll-free "800" number operated by the Problem Gamblers' Help Line of the Texas Council on Problem and Compulsive Gambling to each licensed authorized organization for placement on each card-minding device.

(f) Licensed Authorized Organization Requirements.

(1) Each licensed authorized organization shall be responsible for ensuring that the toll-free "800" number operated by the Problem Gamblers' Help Line of the Texas Council on Problem and Compulsive Gambling is prominently displayed on each card-minding device.

(2) The licensed authorized organization must ensure that the dial-up phone lines remain attached to the site systems at all times and are operational.

(g) Inspection. The commission may examine and inspect any card-minding system, including any individual card-minding device and related site system. Such examination and inspection includes immediate access to the card-minding device and unlimited inspection of all parts of the card-minding system.

(h) Records.

(1) Each manufacturer selling, leasing or otherwise furnishing a card-minding device or system must maintain a single log or other record showing the following:

(A) the date the distributor obtained the card-minding device or system from the manufacturer;

(B) the model, version and serial number of each portable card-minding device;

(C) the account number or terminal number of each fixed-base card-minding device;

(D) the model and version number of all components of the site system software; and

(E) the distributor's name and taxpayer identification number to whom the card-minding system was sold, leased or otherwise furnished.

(2) A manufacturer selling, leasing, or otherwise providing card-minding devices or systems to a distributor must provide the distributor with an invoice or other documentation that contains, at a minimum, the following information and must maintain copies of the invoice or documentation for a period four years:

(A) the date of sale or period covered by the invoice;

(B) number sold or leased; and

(C) total invoice amount.

(3) Each distributor selling, leasing, or otherwise furnishing card-minding systems must maintain a single log or other record showing the following information:

(A) the modem number and quantity of card-minding devices at each bingo premises;

(B) the name of the bingo premises, physical address, telephone number, and licensed commercial lessor's taxpayer identification number where the card-minding system is located;

(C) the date the card-minding system was installed or removed;

(D) the model, version and serial numbers or terminal numbers of the card-minding devices and site system equipment;

(E) the name and taxpayer identification number of the licensed authorized organization or distributor to whom the card-minding device or system was sold, leased or otherwise furnished; and

(F) the name, and taxpayer identification number of the manufacturer or distributor from whom the card-minding device or system was purchased, leased or otherwise obtained.

(4) A distributor selling, leasing, or otherwise providing card-minding systems to a licensed authorized organization or distributor must provide the licensed authorized organization or distributor with an invoice or other documentation that contains, at a minimum, the following information and must maintain copies of the invoice or documentation for a period four years:

(A) the date of sale or period covered by the invoice;

(B) number sold or leased; and

(C) total invoice amount.

(5) Each licensed authorized organization purchasing, leasing, or otherwise utilizing a card-minding system must maintain a log or other records showing the following:

(A) the date the card-minding system was installed or removed; and

(B) the name, and taxpayer identification number of the distributor from which the card-minding system was purchased, leased or otherwise obtained.

(6) If multiple licensed authorized organizations hold an interest in a card-minding system, a single record identifying each licensed authorized organization must be retained on the premises where the card-minding system is utilized.

(7) All records, reports and receipts relating to the card-minding systems' sales, maintenance, and repairs must be retained by the licensed authorized organization on the premises where the licensed authorized organization is licensed to conduct bingo or at a location designated in writing by the licensed authorized organization for a period of four years for examination by the commission. Written notice of any change in the designated playing location or modem number must be received by the commission at least ten days prior to the change.

(8) Each licensed authorized organization that provides card-minding devices for bingo players' use shall maintain for four years reports for each occasion that provides the following information:

(A) the date and time of the session;

(B) the total number of card-minding devices sold;

(C) the serial number of each card-minding device sold;

(D) the total amount of sales of card-minding devices;

(E) the serial numbers of card faces used with each card-minding devices;

(F) the total sales amount of disposable card packages if any sold to be used with card-minding devices; and

(G) the total sales amount of disposable card packages sold.

(9) Each licensed authorized organization must record all bingo sales, including sales of card-minding devices and/or disposable cards, on a point of sale station.

(i) Restrictions.

(1) No manufacturer, distributor or licensed authorized organization may display, use or otherwise furnish a card-minding device which has in any manner been marked, defaced, tampered with, or which otherwise may deceive the player or affect a player's chances of winning.

(2) A card-minding device may be used by a bingo player only when operated in the following manner:

(A) The bingo player must perform at least the following functions:

(i) input each number or symbol called by the licensed authorized organization into the memory of the card-minding device by use of a separate and distinct action for each number or symbol called. Automatic marking of numbers or symbols is prohibited;

(ii) notify the licensed authorized organization when a winning pattern or "bingo" occurs by means that do not utilize the card-minding device or the associated system; and

(iii) identify the winning card face and display the card face to the licensed authorized organization.

(B) The bingo player must be physically present on the premises where the game is actually conducted during the game that is actually being conducted.

(3) If the commission detects or discovers any problem with the card-minding system that affects the security and/or integrity of the bingo game or card-minding system, the commission may direct the manufacturer, distributor, or licensed authorized organization to cease the sale, lease, or use of the card-minding system, as applicable and/or to remove the card-minding system from use or play until further notice by the commission. The commission may require the manufacturer to correct the problem or recall the card-minding system immediately upon notification by the commission to the manufacturer. If the manufacturer, distributor, or licensed authorized organization detects or discovers any defect, malfunction, or problem with the card-minding system that affects the security and/or integrity of the bingo game or card-minding system, the manufacturer, distributor, or licensed authorized organization, as applicable, shall immediately remove the card-minding system from use or play and immediately notify the commission of such action.

(4) A distributor and/or licensed authorized organization may not add or remove any software programs to an approved card-minding system without the permission of the manufacturer. If the commission detects or discovers a card-minding system at a bingo premises that is using components or software that were required to have been approved by the commission but have not been approved, the card-minding system is deemed to have an unauthorized modification.

(5) A manufacturer's demonstration of a non-approved card-minding system or any secondary component may take place only after permission is granted by the commission. The commission may request a manufacturer to voluntarily demonstrate a bingo product to the commission staff that the manufacturer markets in another jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2003.

TRD-200304781
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5113

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TITLE 22. EXAMINING BOARDS

PART 25. STRUCTURAL PEST CONTROL BOARD

CHAPTER 599. TREATMENT STANDARDS

22 TAC §599.11

The Structural Pest Control Board adopts amendments of 22 TAC §599.11 with changes to the proposed text published in the issue of the *Texas Register* (28 TexReg 5046).

Justification for the rule is the strengthening of the educational requirements for those who perform structural fumigations. And in turn that will offer a more assured protection to the public at large as well as for the betterment of the pest control industry as a whole.

The rule will function in that all those who perform structural fumigations will be required to fulfill educational requirements as well as on going educational requirements in order to continue to do fumigation work.

Comments received all expressed concern with the automatic $3000 penalty for failure to notify the Board of a structural fumigation and an industry member spoke against changes in licensing for fumigation. One commenter felt that failure to make capital expenditures did not reduce one's liability. One industry member spoke in favor of §599.11 as raising the standard of the industry.

The group or association making comments for or against the rule were from the industry and the Texas Pest Control Association.

The Board disagrees with the comments made by an industry member regarding the capital expenditures reducing liability. The Board feels that due to the inherent danger of performing structural fumigations, that more practical experience will make for safer fumigations. The Board agrees with the comment on the automatic penalty and has changed the language to reflect calculation of up to $3000 penalty.

The amendment is adopted under the Structural Pest Control Act, Chapter 1951 of the Occupations Code, Texas Revised Civil Statutes Annotated, which provides the Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

§599.11. Structural Fumigation Requirements.

(a) Fumigation of structures to control wood destroying organisms shall be performed only under the direct on-site supervision of a certified applicator licensed by the Board in the category of fumigation. Direct on-site supervision shall mean that the certified applicator exercising such supervision shall be present at the site of the fumigation during the entire time the fumigants are being released and at the time property is released for occupancy.

(b) Fumigation shall be performed in compliance with all label requirements applicable to state, county, and city laws and ordinances and all applicable laws and regulations of the United States.

(c) Prior to the commencement of fumigation, warning signs shall be posted in plainly visible locations on or in the immediate vicinity of all entrances to the space under fumigation and shall not be moved until fumigation and ventilation have been completed, and the premises determined safe for reocccupancy. Ventilation shall be conducted with due regard for the public safety.

(d) Local fire authorities or, when not available, local police authorities, shall be notified prior to introduction of the fumigant and at the time the structure is released for occupancy.

(e) The space to be fumigated shall be vacated by all occupants prior to the commencement of fumigation. The space to be fumigated shall be sealed in such manner to assure concentration of the fumigant released has been retained in compliance with the manufacturer's recommendations.

(f) Warning signs shall be printed in red on white backgrounds and shall contain the following statement in letters not less than two inches in height; "Danger-Fumigation." They shall also depict a skull and crossbones, not less than one inch in height, the name of the fumigant, the date and time fumigant was introduced, and the name, address, and telephone number where the certified applicator performing the fumigation may be reached twenty four (24) hours a day.

(g) On any structure that has been fumigated, the certified applicator who performed the fumigation shall, immediately upon completion, post a durable sign on the wall adjacent to the electric breaker box, water heater, beneath the kitchen sink or in the interior bath trap access. This shall be a durable sign not less than one inch by two inches in size. It shall have the name of the certified applicator, date of fumigation, fumigant used, and the purpose for which it was fumigated (target pest).

(h) A certified applicator performing fumigation shall use adequate warning agents with all fumigants which lack such properties. When conditions involving abnormal hazards exist, the person exercising direct on-site supervision shall take such safety precautions in addition to those prescribed to protect the public health and safety. The certified applicator shall visibly inspect the structures to assure vacancy prior to introduction of fumigant.

(i) The certified applicator shall also post a person or persons at the location from the time the fumigant is introduced until all tarpaulins and seals are removed and the label concentration for aeration is reached. The certified applicator shall then secure all entrances to the structure in such a manner as to prevent entry by anyone other than the certified applicator or an agent of the certified applicator. The structure shall remain secured until the concentration indicated by the fumigant label for release for occupancy is reached.

(j) For the purpose of maintaining proper safety and establishing responsibility in handling the fumigants, the business license holder shall compile and retain for a period of at least two (2) years a report for each fumigation job and/or treatment. The person posted at the location shall deter entry into the structure by routinely inspecting the structure under fumigation at least once each hour. The person posted at the location shall be alert and on duty to prevent entry into the structure while the structure while the fumigant is present. The report for each fumigation job or treatment shall contain the following information:

(1) name and address of pest control company;

(2) name and address of property and owner;

(3) type of roof;

(4) cubic feet fumigated;

(5) target pest or pest controlled;

(6) fumigant or fumigants used and amount;

(7) name of warning agent and amount used;

(8) type of sealing method;

(9) temperature and wind conditions;

(10) time gas introduced and aerated (date and hour);

(11) name of licensee (certified applicator);

(12) list of any extraordinary safety precautions taken;

(13) time released for occupancy (signed by certified applicator;

(14) the date and hour fire or police authorities were notified; and

(15) verification of clearing procedures and identification of devices used.

(k) Fumigations for the purpose of controlling wood destroying insects are subject to the provisions of §599.4 of this title (relating to Disclosure).

(l) Every business license holder engaged in application of a fumigant is required to use an approved clearance device as prescribed on the fumigant label.

(1) This approved calibrated clearance device must be used as required by the label. As appropriate, this device must be calibrated in accordance with manufacturer's recommendations.

(2) An independent facility or person must perform calibration of the clearance device annually. Calibration shall be in compliance with the manufacturer's requirements.

(3) Proof of calibration must be kept on file for a period of two (2) years and available for review by Board personnel and by placing a yearly validation on the clearance device.

(m) The certified applicator responsible for the fumigation site shall be responsible for following all the label prescribed procedures for aeration and clearing the structure that is being fumigated.

(n) The word "trained" is defined as a person having the same qualifications as an apprentice unless the label states more stringent requirements in the application of the fumigant.

(o) Notice of all structural fumigations with contracts requiring treatment of a structure must be called, emailed, or faxed to the Structural Pest Control Board between the hours of 6:00 a.m. and 9:00 p.m. using the specified telephone number, email address or fax number at least four (4), and no more than twenty four (24) hours prior to the structural fumigation application. The licensee must provide address and site location, chemical to be used, date and time of treatment, approximate square footage under contract and the name and physical address of the business licensee. If the structural fumigation is cancelled, notice of the cancellation must be sent using the Board specified telephone number, email address or fax number within one to six hours of the time the licensee learns of the cancellation. Any violation of 22 TAC §599.11(o) will result in a fine of up to $3000 based on a penalty matrix and is considered a base penalty 3.

(p) Before an individual may apply for an initial certified applicator's license in the structural fumigation category (with the exception listed in §599.11(r)), the following experience requirements must be met.

(1) Attend a forty (40) hour structural fumigation school that has at least sixteen (16) hours of hands on training, and has been approved by the Executive Director; Or

(2) Obtain forty (40) hours of on-the-job training with at least sixteen (16) hours of hands on training that is approved by the Executive Director.

(3) A minimum of one CEU per year in structural fumigation is required to maintain the certification following initial testing.

(q) Current certified applicators must conduct/perform at least three structural fumigation jobs per year or sixteen (16) hours of training per year to maintain their certification.

(1) A verifiable performance/training records form will be made available to the Board upon request. These performance/training records forms shall be kept on a format prescribed by the Board in the business file for at least two (2) years after termination of employment. The verifiable performance/training records form will be made available to the certified applicator or technician upon written request.

(2) A minimum of one CEU per year in structural fumigation is required to maintain the certification following initial testing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304811
Dale Burnett
Executive Director
Structural Pest Control Board
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For further information, please call: (512) 305-8270

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 3. MEMORANDUMS OF UNDERSTANDING WITH OTHER STATE AGENCIES

25 TAC §3.21

The Texas Department of Health (department) adopts the repeal of §3.21, concerning a memorandum of understanding for elderly abuse between the department and the Department of Regulatory Services without changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4040) and the proposed text will not be republished.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §3.21 and has determined that reasons for adopting the section no longer exist.

The department published a Notice of Intention to Review for §3.21 in the *Texas Register* on September 4, 1998 (23 TexReg 9077). No comments were received due to publication of this notice.

The department adopts the repeal of §3.21, because there is no statutory requirement for the department to adopt a rule pertaining to a memorandum of understanding concerning elderly abuse between the department and the Department of Protective and Regulatory Services.

No comments were received on the proposal during the comment period.

The repeal is adopted under the Health and Safety Code §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of the existing section implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304884
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 31. NUTRITION SERVICES SUBCHAPTER C. SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC)

25 TAC §§31.21, 31.32 - 31.36

The Texas Department of Health (department) adopts amendments to §§31.21 and 31.32-31.36, concerning definitions; selection of vendors for initial authorization and reauthorization for participation; calculation and use of vendor competitive pricing data; the vendor agreement; and right of administrative appeal by a local agency or vendor for the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). Section 31.32 is adopted with changes to the proposed text as published in the April 18, 2003, issue of the *Texas Register* (28 TexReg 3192). Sections 31.21 and 31.33-31.36 are adopted without changes, and the sections will not be republished.

The United States Department of Agriculture (USDA) provides federal grant funds to the department to administer the WIC Program, provided the department does so in accordance with federal regulations. The WIC Program is funded by a combination of federal grant funds and monies received from infant cereal and formula manufacturers in the form of rebates to the department. Rebate monies are considered dedicated general revenue and may be expended by the department only as offsets to WIC food costs.

The amendments to §31.21 add definitions of the terms "licensed distributor or wholesaler" and "price region;" amend the definition of "vendor band" to include characteristics such as store size, number of checkout lanes, and store type; amend the definition of "vendor competitive pricing" by replacing references to "local agency service area" with "price region"; and amend the definition of "vendor outlet" to prohibit simultaneous use of the premises as a residence; and to require that individual WIC-authorized stores devote at least 500 square feet of floor space to business activities, have clearly identified signage, and be accessible to foot traffic from the street.

The amendment to §31.32 adds a new vendor selection criterion requiring vendors that elect to provide infant formula to WIC participants to purchase infant formula directly from licensed wholesalers, distributors, and/or retailers, or directly from the manufacturer. This amendment supports statewide efforts to address the growing problem of theft of infant formula by creating a deterrent for vendors that purchase infant formula from unlicensed sources. Requiring infant formula provided to WIC clients to be purchased from licensed distributors, retailers, or wholesalers will increase the safety of the product by deterring theft for the purpose of resale and reducing the possibility of product or label tampering. Purchases of infant formula made directly from licensed wholesalers, distributors, and/or retailers, or directly from the manufacturer will be in accordance with and as defined by the Health and Safety Code, Chapter 431, the Texas Food, Drug and Cosmetic Act, and the Bureau of Food and Drug Safety program rules. Other changes include replacement of the terms "local agency area" and "local agency" with the term "price region".

The amendments to §31.33 replace the terms "local agency area" and "local agency" with the term "price region"; provide that a vendor will be disqualified for three months for unauthorized use of the WIC acronym or logo after one written warning; and direct the state agency to accept a civil monetary penalty in lieu of disqualification.

The amendment to §31.34, regarding calculation and use of vendor competitive pricing, incorporates federal regulations that require the state agency to collect overcharges when a vendor fails to comply with competitive pricing requirements and charges prices in excess of those allowed by the selection criteria. Vendors will receive a warning after the first assessment in order to allow them to adjust their pricing. If prices continue to exceed those defined in the selection criteria at the time of the second assessment within a 12-month period, the vendor agreement will be terminated. Amendments to §31.34 also add "WIC-only stores" as a category if the state agency deems it necessary to reassign vendors to alternate price comparison groups, and replace the terms "local agency service area" and "local agency" with the term "price region."

The amendment to §31.35, regarding a vendor's agreement with the state agency, deletes the reference to a probationary vendor agreement, since probationary vendor agreements are no longer issued by WIC.

The amendment to §31.36, regarding the right of a vendor or local agency to appeal, corrects an error of omission when listing the actions defined by federal regulations that are not subject to appeal.

The department is making the following minor changes to clarify the intent and improve the accuracy of the section.

Change: Concerning §31.32(b)(2)(C), the subparagraph as proposed has been redesignated as new §31.32(b)(15) to emphasize its importance as a criterion in consideration of initial vendor applications, and has been reworded for clarity.

Change: Concerning §31.32(b)(10), the paragraph has been amended to clarify that the applicant's previous compliance with WIC Program policies and procedures may be considered if the applicant later seeks authorization as a vendor.

The following comments were received concerning the proposed amendments to the section. Following each comment is the department's response and any resulting change(s).

Comment: Concerning the sections as a whole, two commenters endorsed the rules as proposed, and suggested no changes.

Response: The department acknowledges the commenters' support. No changes were made as a result of these comments.

The commenters were the USDA Food and Nutrition Service and the WIC Advisory Committee. The commenters were in favor of the rules as proposed in their entirety.

The amendments are adopted under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; the Texas Omnibus Hunger Act of 1985, 69th Legislature, Chapter 150, Title II; Human Resources Code, Chapter 33; the Child Nutrition Act of 1966, 42 USC §1786; and 7 CFR Part 246.

§31.32. Selection of Vendors for WIC Initial Authorization for Participation.

(a) A representative from the state agency or the nearest local agency shall perform an on-site evaluation of a vendor applying for authorization to redeem WIC food instruments.

(1) The state or local agency representative shall complete a vendor evaluation form during the visit to the vendor indicating the type of WIC-authorized foods in stock and their shelf prices.

(2) The state or local agency representative shall recommend approval or disapproval of the vendor's application based on the observations during the store visit.

(3) The owner or manager or a store representative shall have the opportunity to review the information on the vendor evaluation form and shall sign the form to acknowledge accuracy of shelf prices listed at the time of the evaluation. The evaluator shall provide a copy of the form, including the date, local agency number, and the name of the evaluator, to the vendor at the time of the in-store evaluation.

(b) The state agency shall base its decision to authorize a vendor on the following criteria:

(1) The vendor's shelf prices for approved WIC foods in stock are competitive for the price region.

(2) The vendor has sufficient quantities of authorized milk, evaporated milk, cheese, cereal, contract infant formula, contract infant cereal, eggs, peanut butter, and dried beans.

(A) A pharmacy may elect to provide only the designated contract milk and soy formulas and special formulas.

(B) A vendor may elect not to provide infant formula.

(C) For vendors who elect to provide all authorized foods, the following amounts of each food type shall constitute sufficient quantities:

(i) a total of at least 108 ounces of adult cereal, including 36 ounces each of at least three of the following types of cereal: oat, corn, wheat, rice, and multi-grain;

(ii) at least six dozen Grade A or AA large, medium, or small size eggs;

(iii) a total of at least 18 containers of juice, including at least two varieties of juice in 46-ounce fluid cans and/or 12-ounce frozen cans;

(iv) a total of at least six pounds of cheese;

(v) a total of at least nine gallons of milk, some of which must be available in one-half gallon containers;

(vi) at least three one-pound bags of dry beans;

(vii) at least three 18-ounce jars of peanut butter;

(viii) at least eight 12-ounce cans of evaporated milk;

(ix) at least 31 cans of milk or soy concentrate infant formula (contract brand) and either eight cans of milk-based powder formula or nine cans of soy powder formula (contract brand); and

(x) at least two 8-ounce boxes or one 16-ounce box of infant cereal.

(3) The vendor provides milk in gallon and half-gallon containers and juice in 46-ounce or 12-ounce containers.

(4) The vendor's shelf prices do not exceed the maximum prices on WIC food instruments.

(5) The recommendation by the state or local agency representative who conducted the on-site evaluation.

(6) The vendor has a retail food operations permit or food manufacturer's permit from the applicable city, county, district, or state health authority.

(7) The vendor's store is clean, with fresh merchandise (no expired food items).

(8) The vendor has no apparent conflict of interest with the local agency in the vendor's service area or with the state agency.

(9) The vendor has posted prices for food items.

(10) If applicable, the vendor's history of compliance with WIC Program policies and procedures.

(11) The vendor has business integrity as indicated by a lack of activities during the past six years including fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or tax evasion.

(12) The vendor is not currently disqualified from the Food Stamp Program or has not been assessed a civil money penalty for hardship by the Food Stamp Program and the disqualification period that would otherwise have been imposed by the Food Stamp Program has not expired unless denying WIC Program authorization would result in inadequate participant access.

(13) The vendor operates and will transact food instruments at a fixed location unless a mobile store is necessary to meet special needs as described in the state agency's state plan and approved by USDA.

(14) The vendor has participated in vendor interactive training.

(15) If a vendor elects to provide infant formula, the vendor shall make available to department inspectors invoices or receipts documenting purchase of all infant formula directly from:

(A) food wholesalers currently licensed in Texas in accordance with the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, and Chapter 229 of this title (relating to Food and Drug);

(B) food manufacturers registered with the U.S. Food and Drug Administration; or

(C) retail food stores holding permits in accordance with the Health and Safety Code, Chapter 437.

(c) If the state agency disapproves the application by a vendor for authorization, the reasons for the disapproval shall be provided to the vendor in writing.

(d) Vendors who apply for authorization who have been evaluated twice within a six-month period and denied approval both times shall not be evaluated again until at least six months from the last evaluation.

(e) In the event a vendor purchases or acquires a store location or business which was in the process of being disqualified or which is disqualified from the WIC Program at the time of acquisition, the vendor's application for that store location or business shall not be considered until the state agency makes a determination that the sale was a bona fide arms-length transaction. The state agency will make this determination no later than six months from the date of application. If the state agency determines that the transfer was not an arms-length transaction, the application shall not be considered until the disqualification period has been served.

(f) If the state agency has disqualified the previous owner of a store location or business for noncompliance or notified the previous owner that the store location or business has been disqualified due to noncompliance, a new owner's application for that store location or business shall not be considered until at least six months from the expiration date of the previous owner's last vendor agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.

(g) The state agency may waive the requirement for an on-site evaluation when a grocery chain comprising 20 or more outlets authorized to participate in the WIC Program purchases or merges with another chain with 20 or more authorized outlets if the merger or purchase does not materially change the stores' staff or pricing structure.

(h) Upon request, the state agency may provide an applicant vendor with tentative authorization to redeem WIC food instruments starting the day the store opens.

(1) To obtain tentative authorization, the vendor shall comply with all of the following criteria:

(A) The owner of the applicant store owns ten or more stores that have been participating in the WIC Program under the current ownership for at least the six-month period prior to application for authorization.

(B) For the six month period prior to application for authorization, fewer than 20% of the applicant's participating stores' authorizations have been terminated for exceeding the competitive pricing criteria for either the woman/child package or the infant food package for their respective price regions and vendor bands.

(C) None of the participating stores has been disqualified from program participation for two or more months within the 12-month period prior to application for authorization.

(D) The applicant store notifies the state agency prior to the official opening date.

(E) The applicant store's manager or assistant manager acknowledges receipt and understanding of the vendor agreement including its attachments, training materials and manuals, the allowable foods list, and vendor rules and policies.

(F) The applicant store's manager or assistant manager has scored at least 70% on a written test provided by the state agency

and returned to the state agency no later than five days prior to the applicant store's opening date.

(2) If, after evaluation, a store which has received tentative authorization from the state agency does not meet all authorization criteria, the store shall be notified of its tentative agreement expiration date and instructed to discontinue redeeming the WIC Program food instruments. The state agency shall honor properly redeemed food instruments from the opening date until the tentative agreement expiration.

(i) On a temporary basis, the state agency may consider and approve applications from new vendors for the following reasons:

(1) the vendor has been authorized to accept Food Stamps;

(2) the disqualification of an existing authorized vendor in a local agency service area would create inadequate access for WIC Program participants;

(3) a currently-authorized vendor outlet(s) changes ownership; or

(4) authorization of a new vendor would result in a significant cost advantage to the WIC Program.

(j) The state agency may deny an application to participate as a vendor if an owner, partner, principal stockholder, officer, director, manager, or operator of the applicant was an owner, partner, principal stockholder, officer, director, manager, or operator of another vendor which has been disqualified or which has violated WIC Program vendor agreement procedures, policies, rules or regulations.

(k) The state agency may hold an authorized vendor individually responsible for previous violations by an owner, partner, manager, or principal stockholder of the vendor when considering renewal of the vendor's agreement or future applications for vendor agreements.

(l) A history of noncompliance with the WIC Program's federal and state statutes and regulations, rules, policies, and procedures shall be considered by the state agency when evaluating an authorized vendor's application for authorization of new outlets. The state agency will not authorize new outlets for a vendor where 50% of the vendor's outlets are in a disqualification or termination status at the time of a request to authorize new outlets.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
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Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 33. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT

The Texas Department of Health (department) adopts amendments to §§33.13-33.14, 33.61-33.63, 33.66, 33.112, 33.122-33.123, 33.125, 33.131-33.135; new §§33.15 and 33.140; and the repeal of §33.139, concerning the administration of Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services. Sections 33.13, 33.15, 33.61-33.62, 33.66, 33.122, 33.125, 33.132, 33.134-33.135 and 33.140 are adopted with changes to the proposed text as published in the April 4, 2003, issue of the *Texas Register* (28 TexReg 2857). Sections 33.14, 33.63, 33.112, 33.123, 33.131 and 33.133 are adopted without changes and will not be republished. In Texas, the EPSDT program is known as Texas Health Steps (THSteps).

Specifically, the final amendments cover program purpose; outreach, informing and support services; recipient rights; confidentiality of records; consent; freedom of choice; eligibility for services; periodicity; periodic check-up due date; exceptions to timely delivery of THSteps services; medical check-up services; medical diagnosis and treatment services; approved medical check-up providers; primary responsibilities of medical check-up providers; and claims. The final new sections concern definitions and management of allegations of Medicaid fraud and program abuse. The repeal covers replacement of hearing aids.

Specifically, the amendments are required to clarify program components that are administered by the department and delete obsolete terms; the new rules add sections regarding definitions and referrals for the investigation of fraud or program abuse. The repealed section eliminates the department's responsibility for replacing hearing aids.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning proposed §33.13(a), a comma was deleted after the term "Periodic," in order to reflect the correct punctuation in the EPSDT program title.

Change: Concerning proposed §33.15(5), the comma between "Steps" and "(THSteps)" was deleted to reflect proper punctuation.

Change: Concerning proposed §33.15(6), the word "and" that preceded "Head Start" was changed to "or" and the phrase "programs that are" was changed to "program that is" for proper grammar.

Change: Concerning proposed §33.15(13), the word, "The" was inserted before "Texas" to reflect the proper title of the Texas Department of Health.

Change: Concerning proposed §33.61(b), the text ", still" was deleted to ensure proper grammar.

Change: Concerning proposed §33.62(a), the word "and" was inserted between "20.012;" and "Government Code" to ensure all included legal cites were applicable to this section.

Change: Concerning proposed §33.66, a comma was inserted between "check-up" and "diagnosis," to reflect proper punctuation.

Change: Concerning proposed §33.122, the following language was inserted at the beginning of subsection (a), "Each THSteps recipient is eligible to receive a comprehensive medical check-up during," replacing the words "THSteps comprehensive medical check-up services are available at."

Change: Concerning proposed §33.125(1), the word "medical" was deleted to ensure this section was not exclusive to only medical check-ups.

Change: Concerning proposed §33.125(2), the word "or" was added at the end of this paragraph to reflect proper format and style.

Change: Concerning proposed §33.132, in the introductory paragraph, the colon following "limitations" was changed to a period to reflect proper format and style.

Change: Concerning proposed §33.132(2), the word "Clients" was changed to "Recipients" to assure uniformity and consistency within these rules.

Change: Concerning proposed §33.134(5)(B), the terms, "clinic, program, or facility" were deleted and replaced with "exempt entity" for clarification.

Change: Concerning proposed §33.135, a portion of subsection (a) was deleted and additional language was added to reflect the reference to 1 Texas Administrative Code, §354.1003, which contains the complete regulations concerning time limitations for the submission of claims and appeals. Subsections (b) and (c) were deleted because although legally correct, §33.135 did not contain the complete regulations regarding time limits for submitting claims and appeals.

Change: Concerning proposed §33.140, the section title "Management of Complaints" was deleted and replaced with "Referral for Investigation of Fraud or Program Abuse" to more accurately reflect the intent of this new section. Also, the words, "as defined in TDH policy" were deleted after the word "action" because the department policy has no effect on another agency's determination of the appropriate action.

The following comments were received concerning the rules during the comment period and the department's response(s) follow each comment:

Comment: Concerning proposed §33.62, one commenter suggested adding language which would identify those agencies THSteps contracts with that provide outreach, informing and transportation, pursuant to Health Insurance Portability and Accountability Act (HIPAA) guidelines which allow recipients the right to request the names of these contracted entities.

Response: The department disagrees. HIPAA and accompanying implementation standards (45 CFR Parts 160, 162 and 164) apply to all covered entities as that term is defined in HIPAA (45 CFR §160.103), including Medicaid. HIPAA requires covered health plans to provide a Notice of Privacy Practices (Notice) to all enrollees. Notices are required to be mailed to Medicaid recipients by Medicaid programs and Medicaid contracted HMOs. These notices advise recipients of certain rights, including the right to an accounting of how and to whom the covered entity uses and discloses the individual's health information. Because the notices adequately disclose these rights, the comment will not be added. No change was made as a result of the comment.

Comment: Concerning the rules in general, one commenter asked why the proposed rules deleted "EPSDT" and replaced it with "medical check-up." The commenter asked if there are implications for the language change.

Response: There was no replacement of "EPSDT" with the term "medical check-up." Rather, "EPSDT" was deleted and replaced with the term Texas Health Steps; "Screening," was deleted and replaced with the term "medical check-up." The department, following stakeholder input, adopted "Texas Health Steps" as the name that better described the program's goals and was more easily identified by recipients. Many recipients did not understand the terms "Early and Periodic Screening, Diagnosis, and Treatment or "EPSDT". Because "medical check-up" is a term more in line with every day language and better describes what is involved in early and periodic screening, diagnosis and treatment, the department chose to replace "screening," with the term, "medical check-up." The positive implications of the terminology changes will ensure clarification and comprehension of program goals; there should be no negative implications as a result of these changes. No change was made as a result of this comment.

Comment: Concerning proposed §33.62(a), one commenter suggested deleting the word "Public" because it was too vague. The commenter suggested this rule should be more specific in terms of the law to which it referred.

Response: The department agrees. The word "Public" has been deleted and replaced with the words "Federal and state" in the subsection for clarity.

Comment: Concerning proposed §33.62(b), one commenter suggested deleting language which indicated certain contracted agencies are "considered an extension of TDH" because while such entities are contracted to perform the services and are delegated to act on behalf of TDH, they do not become an extension of TDH nor are such entities entitled to rights and protections of the department. The commenter suggested revising the language in this section to better define the legal relationship between TDH and its contractor.

Response: The department agrees. "Agencies" has been deleted and replaced with "entities," or "contracted entities" throughout this subsection, as appropriate, in order to clarify the relationship. In addition, "in that such entities" was inserted between "operations" and "including" to better clarify the relationship.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed the sections and has determined that reasons for adopting the sections continue to exist; however, the revisions are needed to reflect the changes to program administration and the laws that pertain to them.

The department published a Notice of Intention to Review for §§33.13-33.14, 33.61-33.63, 33.66, 33.112, 33.122-33.123, 33.125, 33.131-33.135, and 33.139, in the *Texas Register* on May 12, 2000 (25 TexReg 4358). No comments were received.

The department received comments from one individual representing Community Health Choice, a health maintenance organization (HMO), who was generally in favor of the rules and made recommendations.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§33.13 - 33.15

The amendments and new section are adopted under the Human Resources Code, §32.021, which allows the department to establish rules governing the Medicaid program; the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health; and the Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance

program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the Early and Periodic Screening, Diagnosis, and Treatment program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07. The review of these rules implements Government Code, §2001.039.

§33.13. Purpose.

(a) The Texas Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program is a Title XIX federally-mandated program of prevention, diagnosis, and treatment for Medicaid recipients under age 21 years. In Texas, EPSDT is known as the Texas Health Steps (THSteps) program. The Texas Department of Health administers the medical and dental check-ups and treatment components of this program.

(b) THSteps check-up services will be provided when requested by the recipient according to periodic eligibility for service. Other THSteps services will be provided when medical or dental necessity is established and federal financial participation is available.

(c) The rules in this subchapter implement the medical and dental check-up, dental treatment, and outreach and informing components of THSteps.

§33.15. Definitions.

The following words or terms, when used in Subchapters A, B, C, D, and E, shall have the following meanings unless the context clearly indicates otherwise:

(1) Accompanied - A parent, guardian or authorized adult who presents a recipient under age 15 at a THSteps medical or dental check-up, or treatment visit and continues to wait for the child while the check-up or treatment takes place. It is a requirement of §33.134(e) of this title (relating to Primary Responsibilities of Medical Check-up Providers) of Subchapter E that a recipient under the age of 15 be accompanied as a condition for reimbursement, unless services are provided by an exempt entity.

(2) Authorized adult - A person, including an adult related to the child, who is authorized by a child's parent or guardian to accompany that child to a THSteps medical or dental check-up or treatment visit.

(3) Board - The Texas Board of Health.

(4) EOB - Explanation of Benefits.

(5) EPSDT - Early and Periodic Screening, Diagnosis, and Treatment is a service of the Medicaid program. EPSDT provides medical and dental check-ups, diagnosis, and treatment to Medicaid eligible recipients younger than 21 years of age. EPSDT is known in Texas as Texas Health Steps (THSteps).

(6) Exempt entity - A child-care facility (as defined in the Human Resources Code §42.002(3)), school health clinic, or Head Start program that is exempt from the parental accompaniment requirement under §33.134(e) of this title of Subchapter E.

(7) FFP - Federal financial participation is the federal government's share of a state's expenditures under the Medicaid program.

(8) HHSC - The Health and Human Services Commission.

(9) Medicaid - The medical assistance program implemented by the State of Texas under the provisions of Title XIX of the Social Security Act, as amended, (42.U.S.C. §§1396-1396v).

(10) Parental Involvement - The encouragement and involvement in and management of the health care of children receiving services from an exempt entity as defined in paragraph (6) of this section. Parental involvement includes the exempt entity notifying the child's parent, guardian, or other authorized adult before each visit for a THSteps medical or dental check-up or treatment visit of the time and place of the child's appointment and encouraging the parent, guardian, or other authorized adult to attend. Notification shall be done by the means of communication determined by the exempt entity to be the most effective. Such communication must be documented and may include, but is not limited to, one or more of the following options: a home visit from an outreach worker, written or printed correspondence, or telephone contact.

(11) Recipient - An individual who has been determined eligible for Medicaid.

(12) R&S - A Remittance and Status report that provides information on pending, paid, denied, and adjusted claims.

(13) TDH - The Texas Department of Health.

(14) THSteps - Texas Health Steps (THSteps) is the Texas name for the federally-mandated Medicaid service known as EPSDT.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER B. RECIPIENT RIGHTS

25 TAC §§33.61 - 33.63, 33.66

The amendments are adopted under the Human Resources Code, §32.021, which allows the department to establish rules governing the Medicaid program; the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health; and the Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the Early and Periodic Screening, Diagnosis, and Treatment program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07. The review of these rules implements Government Code, §2001.039.

§33.61. Recipient Rights.

(a) Acceptance of THSteps services is voluntary. Acceptance or refusal of THSteps services does not affect eligibility for or benefits of any other Medicaid service.

(b) A recipient who refuses THSteps services may subsequently request and be provided such services if still eligible for Medicaid and THSteps.

(c) All THSteps records about recipients are considered confidential information.

§33.62. Confidentiality of Records.

(a) Federal and state laws and Medicaid regulations prohibit the disclosure of information about Medicaid recipients without the recipient's consent, except for purposes directly connected with the administration of the program (see 42 U.S.C. §1396a(a)(7); 42 C.F.R. §§431.301-431.306; Human Resources Code §§12.003 and 21.012; and Government Code §552.101). Eligibility and other information for which the recipient gives consent may be provided to THSteps providers. Medicaid providers of THSteps services are not considered directly connected with the administration of the program. Consequently, THSteps providers are not entitled to confidential information, including lists of names and addresses of recipients, without the consent of the recipient.

(b) Contracted entities performing certain administrative functions are considered an extension of TDH in exercising its responsibility to ensure effective THSteps program operations in that such entities, including contractors for outreach, informing, and transportation services, may receive confidential information without an individual recipient's consent to the extent that it is necessary in the administration of the contract. Pursuant to 42 U.S.C. §1396a(a)(7), 42 C.F.R. §§431.301-431.306 and Human Resources Code §12.003, these contracted entities are bound by the same standards of confidentiality as TDH. They must provide effective safeguards to ensure confidentiality.

§33.66. Freedom of Choice.

(a) All THSteps recipients have the right to choose participating providers of THSteps medical and dental check-up, diagnosis, and treatment services.

(b) Selection assistance provided to the recipient must be free of worker preferences or prejudices.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Department of Health
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SUBCHAPTER C. ELIGIBILITY

25 TAC §33.112

The amendment is adopted under the Human Resources Code, §32.021, which allows the department to establish rules governing the Medicaid program; the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health; and the Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the Early and Periodic Screening, Diagnosis, and Treatment program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07. The review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. PERIODICITY

25 TAC §§33.122, 33.123, 33.125

The amendments are adopted under the Human Resources Code, §32.021, which allows the department to establish rules governing the Medicaid program; the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health; and the Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the Early and Periodic Screening, Diagnosis, and Treatment program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07. The review of these rules implements Government Code, §2001.039.

§33.122. Periodicity.

(a) Each THSteps recipient is eligible to receive a comprehensive medical check-up during each of the following time periods:

(1) newborn inpatient examination;

(2) one month;

(3) two months;

(4) four months;

(5) six months;

(6) nine months;

(7) 12 months;

(8) 15 months;

(9) 18 months;

(10) two years;

(11) three years;

(12) four years;

(13) five years;

(14) six years through seven years;

(15) eight years through nine years;

(16) 10 years;

(17) 11 years;

(18) 12 years;

(19) 13 years;

(20) 14 years;

(21) 15 years;

(22) 16 years;

(23) 17 years;

(24) 18 years;

(25) 19 years;

(26) 20 years.

(b) Periodic routine dental check-up services are available for eligible recipients one year of age and older once every six months, based on the date of the recipient's last dental check-up.

§33.125. Exceptions to Timely Delivery of THSteps Services.

Exceptions to standards for the timely delivery of THSteps services can be made if:

(1) the recipient or family loses eligibility. This means that the recipient or family does not have a valid Medicaid identification form or Medicaid verification letter for the date that a check-up or the first appointment for diagnosis and treatment is scheduled;

(2) the recipient or family could not be located despite a good faith effort to do so. This means that no personal contact could be made with an adult member of the recipient's family; or

(3) the recipient's failure to receive necessary services in a timely manner was due to an action or decision of the family or recipient rather than a failure of THSteps or its designee to offer and provide support services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
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SUBCHAPTER E. MEDICAL SERVICES

25 TAC §§33.131 - 33.135, 33.140

The amendments and new section are adopted under the Human Resources Code, §32.021, which allows the department to establish rules governing the Medicaid program; the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health; and the Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the Early and Periodic Screening, Diagnosis, and Treatment program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07. The review of these rules implements Government Code, §2001.039.

§33.132. Medical Diagnosis and Treatment Services.
Payment will be considered for any service considered medically necessary and for which federal financial participation is available, subject to the following limitations.

(1) Service coverage is determined on an individual basis, requires prior approval for payment by HHSC or its designee, and is subject to periodic reassessment.

(2) Recipients must be under age 21 and eligible for Medicaid on the date of service.

(3) Payment for services will be made only to approved providers enrolled in the Texas Medicaid Program.

§33.134. Primary Responsibilities of Medical Check-up Providers.
The primary responsibilities of medical check-up providers are:

(1) to conduct medical check-ups according to policies and procedures established by TDH;

(2) to provide clinic surroundings which will establish a good relationship between clinic personnel, the recipient, and the recipient's family;

(3) to interpret medical check-up results to the recipient or the recipient's parent, conservator, or responsible adult, during the course of the medical check-up;

(4) to make referrals for needed follow-up diagnosis and treatment services; and

(5) to ensure a recipient under age 15 is accompanied by a parent, guardian or authorized adult at a THSteps medical check-up unless the services are provided by an exempt entity and if the exempt entity:

(A) obtains written consent to the services, which has not been revoked, from the child's parent or guardian within the one-year period prior to the date the services are provided; and

(B) encourages parental involvement in and management of the health care of the children receiving services from the exempt entity.

§33.135. Claims - Time Limits, Return, and Denial.
The THSteps Program has time limits for submitting claims. Time limits for filing claims and appeals shall be in accordance with the rules of the Health and Human Services Commission, 1 Texas Administrative Code, §354.1003.

§33.140. Referral for Investigation of Fraud or Program Abuse.
TDH will report all allegations of Medicaid fraud and other unlawful activities to the appropriate authority for review of the allegations and determination of the appropriate action. TDH will refer all complaints alleging quality of care issues to the appropriate licensing or regulatory authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
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25 TAC §33.139

The repeal is adopted under the Human Resources Code, §32.021, which allows the department to establish rules governing the Medicaid program; the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health; and the Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the Early and Periodic Screening, Diagnosis, and Treatment program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES
SUBCHAPTER P. SURVEILLANCE AND CONTROL OF BIRTH DEFECTS

25 TAC §§37.301 - 37.306

The Texas Department of Health (department) adopts amendments to §§37.301-37.306, concerning the surveillance and control of birth defects. Sections 37.301-37.306 are adopted without changes to the proposed text as published in the April 18, 2003, issue of the *Texas Register* (28 TexReg 3197) and will not be republished. The sections are amended to correlate with current state law and to add clarity to portions of the rules.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). Sections 37.301-37.306 have been reviewed and the department has determined that reasons for adopting the sections continue to exist, in that rules on this subject are needed.

The department published a Notice of Intention to Review for §§37.301-37.306, concerning Government Code, §2001.039, in the *Texas Register* on April 28, 2000 (25 TexReg 3799). The department received no comments due to the publication of the notice.

No comments were received on the proposal during the comment period.

The amendments are adopted under Texas Health and Safety Code, §87.021, which requires the Texas Board of Health (board) to adopt rules on the operation of the birth defects program; §87.022, which requires the board to adopt rules on how information will be collected and made available; §87.063, which requires the board to establish criteria to be used in deciding how research proposals will be approved; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304916
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 28, 2003
Proposal publication date: April 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 91. CANCER
SUBCHAPTER B. PROSTATE CANCER ADVISORY COMMITTEE

25 TAC §91.21

The Texas Department of Health (department) adopts the repeal of §91.21, concerning the Prostate Cancer Advisory Committee (committee), without changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4041) and will not be republished. The committee has provided advice to the Texas Board of Health (board) and the department on strategies for educating the public on the health benefits of the early detection, prevention, and treatment of prostate cancer.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 2002, the board established a rule relating to the Prostate Cancer Advisory Committee. The rule states that the committee will automatically be abolished on September 1, 2003. The board has now reviewed and evaluated the committee and has determined that the committee should be abolished on that date.

Issues relating to the type of advice previously provided by the committee may be better addressed through the establishment of ad hoc workgroups.

There were no comments received concerning the repeal during the 30-day comment period.

The repeal is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
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Texas Department of Health
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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER E. PROVISION OF ANTI-RABIES BIOLOGICALS

25 TAC §§97.121, 97.123 - 97.125

The Texas Department of Health (department) adopts amendments to §97.121 and §§97.123 - 97.125, concerning the provision of anti-rabies biologicals. Section 97.124 is adopted with changes to the proposed text as published in the April 18, 2003, issue of the *Texas Register* (28 TexReg 3200). Sections 97.121, 97.123, and 97.125 are adopted without changes and will not be republished. The sections are amended to correlate with current state law and to add clarity to portions of the rules.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001, (Administrative Procedures Act). Section 97.121 and §§97.123 - 97.125 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on these subjects are needed.

The department published a Notice of Intention to Review for §97.121 and §§97.123 - 97.125 as required by Government Code, §2001.039, in the *Texas Register* on January 14, 2000 (25 TexReg 275). The department received no comments due to the publication of the notice.

No comments were received on the proposal during the comment period. However, the department has made the following minor change due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §97.124, the word "distribution" was replaced with "biologicals" in the first sentence of the section.

The amendments are adopted under Texas Health and Safety Code, §12.033, which provides for fees for the distribution and administration of certain vaccines and sera; §826.025, which provides for vaccine and hyperimmune serum to be dispensed to persons at risk of being exposed to rabies; §826.011, which requires the Texas Board of Health (board) to adopt rules necessary to effectively administer Chapter 826; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

§97.124. Payment for Anti-Rabies Biologicals.

The department is specifically authorized by law to distribute anti-rabies biologicals and to receive reimbursement for the cost of the biologicals.

(1) Options for reimbursement will be in accordance with policies set by the Immunizations Division, Texas Department of Health, and are as follows:

(A) Payment at time of issue. Arrangements for payment must be complete at the time of issuance of the anti-rabies biologicals, including options for monthly payments and/or third party coverage, or payment in full at the time of receipt. The regional director is responsible for ensuring that payment arrangements are made.

(B) Inability to pay. The regional director will accept, in lieu of payment, a statement signed by the patient that the patient is unable to pay in whole or part the cost of the biologicals and has no third party or other alternate source to provide payment.

(2) Refusal to pay. The department shall have the right to seek reimbursement in the event of a refusal to pay by a patient, or by his or her third-party coverage or other legally obligated source. A county or district attorney or the Texas attorney general, upon request of a department, may initiate suit or other proceeding in the county of the recipient's residence against the recipient, the parent, guardian, or other person or persons legally responsible for the support of the recipient or against responsible third parties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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CHAPTER 98. HIV AND STD PREVENTION
SUBCHAPTER C. TEXAS HIV MEDICATION PROGRAM
DIVISION 1. GENERAL PROVISIONS

The Texas Department of Health (department) adopts amendments to §§98.101 - 98.106, repeal of §§98.107 - 98.117, and

new §§98.107 - 98.115, and §§98.117 - 98.119, concerning the Texas HIV Medication Program. The amendments to §§98.101, 98.102, and 98.106, new §§98.107, 98.109, 98.110, 98.112, 98.114, 98.115, 98.117, and 98.119 are adopted with changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4041), as a result of comments received during the 30-day comment period. The amendments to §§98.103 - 98.105, new §§98.108, 98.111, 98.113, and 98.118, and the repeal of §§98.107 - 98.117 are adopted without changes and will not be republished. Proposed new §98.116 has been withdrawn and was published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4041).

The amendments allow the department to implement cost containment measures, outlined in the rules, as needed to address a substantial budgetary shortfall in the program and to ensure that the department is able to continue delivering program services to individuals infected with the human immunodeficiency virus (HIV). Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). Sections 98.101 - 98.117 have been reviewed, and the department has determined that the reasons for adopting the sections continue to exist; however, §§98.101 - 98.106 were amended; §§98.107 - 98.117 were repealed; and §§98.107 - 98.115 and §§98.117 - 98.119 are adopted as new rules.

The department published a Notice of Intention to Review for the sections, as required by Government Code, §2001.039, in the *Texas Register* on April 28, 2000 (25 TexReg 3801). No comments were received due to the publication of this notice.

The amendments cover: Purpose; Definitions; Medication Coverage; Nondiscrimination; Priority; General Eligibility Criteria. The repeal of §§98.107 - 98.117 allows for the adoption of the new sections in *Texas Register* format. The new sections cover: Medical Eligibility Criteria; Residency Eligibility Criteria; Financial Eligibility Criteria; Application Process; Confidentiality; Program Distribution of Medications; Participating Pharmacy; Prescription Fees; Fiscal Planning; Denial of Application or Termination of Client Benefits; Appeal Procedures; and Exceptions from Appeal Procedures.

The amendment to §98.101 reflects minor changes in wording regarding the purpose of the program. The amendment to §98.102 adds a definition for Eligible Metropolitan Area and deletes a definition for the HIV H.O.P.E. (Health Options to Promote Employment) Project. The amendment to §98.103 adds a provision that the program will not approve the dispensing of medication(s) in excess of a 30-day supply. The amendment to §98.104 includes a minor change for clarity. The amendment to §98.105 establishes the program's priority to serve eligible women and infants, and to children younger than 18 years of age. The amendment to §98.106 outlines the general eligibility criteria for participation in the program. New §98.107 establishes medical eligibility criteria for the program. New §98.108 establishes residency eligibility criteria for the program. New §98.109 establishes financial eligibility criteria for the program. New §98.110 establishes the process for applying to the program. New §98.111 establishes how the program will maintain confidentiality of individuals who apply and receive services from the program. New §98.112 establishes how the program will distribute medications. New §98.113 establishes that the program will only deliver services through pharmacies approved by the program. New §98.114 establishes that pharmacies participating in the program may collect a dispensing fee for each prescription dispensed and that the program will pay the dispensing fees for Medicaid clients. New §98.115 establishes temporary cost-containment measures, such as initiate medical criteria to meet at minimum the most recent Federal Department of Health and Human Services Guidelines for the Use of Antiretroviral Agents in HIV-Infected Adults and Adolescents, discontinue using the formula for adjusting the clients' gross annual income, lower the financial eligibility criteria, and cease enrollment of new clients. New §98.117 establishes the criteria for denial of applications to the program and termination of client benefits. New §98.118 establishes appeal procedures when a person wishes to dispute the program's decision concerning either eligibility or funding. New §98.119 establishes that the department is not required to offer an opportunity to dispute the decision to deny or terminate client status when the department's actions result from the exhaustion of funds.

The department is making the following changes due to staff comments.

Change: Concerning §98.101, the program only provides prescription drugs and offers no other types of prescription assistance; therefore, the proposed rule language was changed to make clear that the program provides "prescription drugs" to low-income individuals with HIV disease.

Change: Concerning §98.102(6), the first word "A" in the definition was capitalized to be consistent with Texas Register format.

Change: Concerning §98.106(5), an applicant must submit a complete application to be considered for enrollment in the program. Proposed rule language did not clearly stipulate that the application for assistance must be complete; therefore, the final rule language has been amended to clarify this requirement.

Change: Concerning §98.107(a)(2), the word "medications(s)" was replaced with the word "medications" to correct a grammatical error.

Change: Concerning §98.110, the program must occasionally verify or collect additional information pertaining to the application or recertification process. Subsection (c) was added to the section to clarify that the applicant is expected to give informed consent to the department so that the program may contact an applicant, client, or medical provider to verify information contained in the application or to request additional supporting documentation pertaining to the application for enrollment or recertification purposes.

Change: Concerning §98.112, a comma was added after the word "Division".

Change: Concerning §98.115, the section pertains to fiscal planning and not program budget; therefore, the title of this section has been amended.

Change: Concerning §98.115(a)(1) - (2), the formula for determining the annual average cost to the program for providing prescription drugs to clients is derived from the aggregate client costs, and not the individual per client cost; therefore, the section has been amended to add clarity.

Change: Concerning §98.115(c)(1)(A) - (D), proposed language was amended to make the subsection stylistically consistent. The cost-containment measures described in this subsection have been re-prioritized.

Change: Concerning §98.115(c)(1)(A), the word "Initiate" was added to the first of sentence before the word "medical", and the word "must" was deleted and the word "to" was added before the word "meet" to correct the grammatical structure of the paragraph.

Change: Concerning proposed §98.115(c)(1)(E), renumbered as (C), clarifying language was added to improve comprehension of the paragraph. Specifically, the word "financial" has been added to describe the eligibility criteria being referred to, and a reference to §98.109(a)(4) of this title relating to Financial Eligibility Criteria has been added.

Change: Concerning §98.115(c)(2), the word "reverse" before "the cost-containment" has been replaced with the word "rescind" to correct the grammatically complex statement.

Change: Concerning §98.119, the change corrects a grammatically incorrect statement.

The following comments were received concerning the proposed sections during the public comment period. Following each comment is the department's response and change.

Comment: Concerning §98.106(4), one commenter felt the insertion of the word "only" seemed gratuitous and unnecessary since the program cannot provide medications not included on its formulary, and implied that someone applying for both formulary and non-formulary medications would somehow be declared ineligible.

Response: The department agrees. The word "only" was removed from §98.106(4).

Comment: Concerning §98.107(b), one commenter suggested that language allowing the Bureau Chief to make exceptions to the medical eligibility criteria should be moved to §98.115(c)(1)(A) for clarity. Another commenter felt that the rules as written appear to indicate that the Bureau Chief may waive medical criteria only if cost-containment measures have not been implemented, and suggested the wording be clarified to indicate the Bureau Chief has broader power to waive medical criteria in any case for every client, regardless of the implementation of cost-containment measures.

Response: The department disagrees. The Bureau Chief's ability to make exceptions to medical eligibility is clearly defined in §98.107(b). No change was made as a result of this comment.

Comment: Concerning §98.109(a)(2), three commenters asserted that the proposed rules did not clearly state that exceptions would be allowed for inadequate private insurance prescription coverage and that Medicare supplements were not specifically addressed. The commenters wanted to ensure that the rules treat all underinsured individuals in the same manner, regardless of whether their health care is provided in part by the government or by a private insurer. One of the commenters also stated that the methodology of projecting future expenditures would need to also take into account increases in the cost of medications for more accurate forecasting.

Response: The department agrees. The wording in §98.109(a)(1) - (3) has been strengthened to allow the program to provide prescription drugs to clients who receive less than full coverage for prescription medications regardless of whether clients participate in federal, state or private insurance programs.

Comment: Concerning §98.109(a)(4), three commenters felt that clarification was needed to ensure that currently enrolled clients would not be negatively impacted by the implementation of the new financial eligibility criteria that bases eligibility on annual gross income rather than on adjusted annual gross income. One commenter recommended retaining the income adjustment as a criterion for eligibility and then placing the adjustment on hold when funding levels preclude its utilization.

Response: The department agrees. The adjustment to a client's annual gross income has been retained. The suspension of the income adjustment has been added to the cost-containment measures described in §98.115(c)(1). New language in §98.115(d) ensures that cost-containment measures, if and when implemented, will apply to clients enrolling in the program after the cost-containment measure is implemented.

Comment: One commenter expressed confusion over the use of the terms "minors" versus "emancipated minors" in §98.109(b)(2) and §98.102(9), and felt clarification was necessary.

Response: The department agrees and has changed §98.109(b)(2) and added new §98.109(b)(3) to distinguish the difference of determining the financial eligibility criteria of a minor and that applied to an emancipated minor. Section 98.102(9) was not revised.

Comment: Concerning §98.114, one commenter was concerned that the section implied that client fees could consist of both prescription co-payments and a monthly premium for services received. A second commenter stated that it was unclear whether "dispensing fees" for Medicaid clients also included the co-payments that are being proposed by Medicaid.

Response: The department agrees. Concerning §98.114, the word "copayment" has been changed to "dispensing fee". Concerning §98.116, the rules proposing the department collect client fees have been deleted.

Comment: Concerning §98.115(a), one commenter would like to see the monthly analysis of program costs made available on a regular basis via the program web site.

Response: The department agrees. The department will consider posting expenditure and utilization data on the program web site. No change was made as a result of this comment.

Comment: Concerning §98.115(c)(1)(B), two commenters noted that the implementation of a cost-containment measure that would halt admission of clients from Title I Eligible Metopolitan Areas (EMAs) appears to violate the Ryan White Care Act and does not treat all clients equally. One commenter specified that the provision also violated the U.S. Department of Health and Human Services policy, the Equal Protection Clause of the Fourteenth Amendment, and the Health Resources and Services Administration's Department of Social Services Program Policy Guidance Number 5, which specifies that AIDS Drug Assistance Program (ADAP) treatments must be equally and consistently applied across the state.

Response: The department agrees that the proposed rules would not provide equal opportunity to all persons choosing to enroll in the program. Concerning §98.115(c)(1)(B), the proposed cost containment strategy to cease enrollment to clients living in Title I EMAs has been deleted. Cost containment strategies, if implemented, will be applied equitably to all clients.

Comment: Concerning proposed §98.115(c)(1)(D), two commenters questioned the viability of implementing client fees for service. It was recommended that the implementation of

sliding scale fees be eliminated because the revenue the fees would generate would not cover the department's administrative expense of collecting the fees.

Response: The department agrees. The language in §98.115(c)(1)(D) was deleted and §98.116 has been withdrawn.

Comment: Concerning §98.116(c) and (d), one commenter thought the wording was unclear as to whether both sections were describing the same client fees. The commenter also stated that the word "monthly" needed to be added to describe the fees, otherwise the fees could be construed as outrageously high co-payments per prescription for this population.

Response: The department agrees. The language in §98.115(c)(1)(D) was deleted and §98.116 has been withdrawn.

Comment: Concerning the repeal of §98.117, one commenter felt the provision for making complaints needed to be reinstated in the rules, either in this section or elsewhere in the rules governing the Bureau.

Response: The department disagrees. Public complaints are processed in accordance with established department policy. No change was made as a result of this comment.

Comment: Concerning §98.117(a)(1)(B), three commenters stated that clarification was needed to assure that current clients would not be terminated from the program if they do not meet the revised financial eligibility criteria proposed in new §98.109. It was recommended that a clear statement of intention regarding the continuing eligibility (or "grandfathering") of current clients be incorporated into the proposed rules.

Response: The department agrees. New language in §98.115(d) ensures that cost-containment measures, if and when implemented, will apply to clients enrolling in the program after the cost-containment measure is implemented. Section 98.117(a)(1)(B) was not revised.

Comment: Concerning §98.117(a)(2)(C), two commenters expressed concern that clients who cease to receive services for a time-period exceeding three months due to physician scheduled treatment interruptions (STIs), also known as "drug holidays", could be subject to termination from the program. One commenter suggested the following rewording as follows: "the client has not requested or used services during any period of three consecutive months, and the program has established that the client's failure to access services during the period was not the result of reliance on the advice or suggestion of a medical provider."

Response: The department agrees. Section 98.117(a)(2)(C) has been changed from three consecutive months to six consecutive months.

Comment: Concerning §98.118(b), one commenter thought that the review panel for appeals regarding denial or termination of service should include an additional person or persons who have not been directly involved in the previous decision-making process.

Response: The department disagrees. The Chief of the Bureau of Communicable Disease Prevention and Control, is an external member of the review panel who is not involved in the daily operations of the Bureau of HIV and STD Prevention and, therefore, is an objective reviewer. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter stated that the program should require annual recertifications of all clients. Third party client certifications from clinics and other service providers should not be accepted as proof of recertification, as those organizations may misrepresent their client's eligibility status in order to gain program approval.

Response: The department agrees. Section 98.109(c) has been added to allow the program to annually verify the financial status of an enrolled client to determine if the client is continuing to meet the financial eligibility criteria of the program.

Comment: Concerning the rules in general, one commenter expressed confusion regarding the need for rule changes since the Texas Legislature has appropriated additional funding.

Response: The department disagrees. The program did not receive its full requested amount of funding for fiscal years 2004 - 2005. Funding shortfalls are still projected for fiscal years 2004 - 2005, necessitating rule changes to maintain fiscal responsibility for the program. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter felt that drug prices should be negotiated with the manufacturers in order to secure lower drug prices for the program rather than implementing eligibility changes.

Response: The department disagrees. The program is part of a National Task Force that has been negotiating additional drug discounts from major manufacturers of HIV drugs. The aggregate amount of these discounts fall far short of the amount needed to cover the projected budget shortfalls for fiscal years 2004 - 2005. No change was made as a result of this comment.

Comment: Concerning the rules in general, several commenters stated that they believed the implementation of medical criteria for determining eligibility of new and returning clients was the most acceptable and/or least damaging option of the cost-containment measures proposed.

Response: The department agrees. The implementation of additional medical eligibility criteria is the first cost-containment strategy that will be implemented if needed. No change was made as a result of this comment.

Comment: Concerning the rules in general, two commenters thought that any proposed cost-sharing fees passed on to clients should be capped.

Response: The department agrees. The cost-containment strategy of implementing client fees has been deleted from §98.115(c)(1)(D) and §98.116 has been withdrawn.

Comment: Concerning the rules in general, one commenter believed that if Priority Two and Three medications were removed from the program formulary, it would be preferable to have Priority Three removed first, with Priority Two removed only if absolutely necessary to continue services.

Response: The department agrees; however, removing any currently approved medication from the program was not proposed. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter expressed favor of eliminating the spend-down for income adjustment before restricting income eligibility any further than 200% of Federal Poverty Level (FPL).

Response: The department agrees. Suspending the adjustment for annual gross income has been added to the cost-containment strategies listed in §98.115(c).

Comment: Concerning the rules in general, one commenter requested that the program facilitate a process that would allow local agencies to purchase supplemental HIV medications at a reduced cost.

Response: The department agrees. The department is currently analyzing the feasibility of assisting local agencies in securing HIV medications at the same cost that the department pays. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter stated that in order to encourage Texans enrolled in the program to maintain health insurance coverage, the out-of-pocket expenses the client pays to maintain health insurance should be subtracted from the client's annual gross income.

Response: The department disagrees. The program is not a provider of health insurance but a provider of medications. The annualized cost of a person's medications is used to adjust the person's annual income for eligibility purposes. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter felt that priority should be given to the clients most in need medically rather than financially as determined by their viral load and T-cell counts. The commenter stated the neediest clients would not necessarily also be the poorest clients.

Response: The department agrees. Concerning §98.115(c)(1)(A), language has been added to require that applicants, applying to the program after the cost-containment strategy has been implemented, meet "at minimum" the most recent Federal Department of Health and Human Services Guidelines for the Use of Antiretroviral Agents in HIV-infected Adults and Adolescents.

Comment: Concerning the rules in general, one commenter stated that the Medical Certification Form (MCF) should be changed in order to allow a patient's medical provider to establish medical eligibility rather than having someone representing the department doing it.

Response: The department disagrees. Both federal and state governments mandate eligibility criteria be developed by the state agency managing the AIDS Drug Assistance Program (ADAP). No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter opined that by providing priority access to participation to eligible women and infants the program is performing a disservice to the persons living with HIV/AIDS in the West Texas planning area, 90% of which are male.

Response: The department disagrees. The overwhelming majority of program clients are male. They represent 78% of the total enrolled clients. Women make up only 22% of the total clients. As for children, less than 1% of the program's clients are under the age of 19. No change was made as a result of this comment.

Comment: Concerning the rules in general, several commenters expressed their disapproval that funds for international AIDS relief efforts were being increased at the same time domestic policies were preventing clients in need from accessing needed medications and medical services within our own country.

Response: The department does not agree or disagree with the comment. The department is not involved in international AIDS relief. No change was made as a result of this comment.

Comment: Concerning the rules in general, two commenters mentioned that a portion of the Texas Lottery profits should be diverted to the program to help cover expenses.

Response: The department does not agree or disagree with the comment. The department is not involved in the allocation of Texas Lottery profits. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter asserted that the money donated to the department should be used to assist with purchasing of HIV medication.

Response: The department disagrees. The program does not receive public donations to support the activities of the program. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter suggested that the department continue dialogue with HIV planning bodies and Title I EMAs before attempting to redirect a portion of State and/or Ryan White client service dollars into the program.

Response: The department agrees. Dialogue with Texas Title I EMAs and the department is continuing. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter requested that the program focus their energy on continuing to work with state AIDS directors to negotiate reasonable prices for HIV medications as a long-term solution.

Response: The department agrees. The Bureau of HIV and STD Prevention is involved with the National ADAP Task Force in an effort to negotiate lower drug costs with drug manufacturers. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter warned the program not to rely on manufacturers' compassionate care programs for continuing assistance.

Response: The department disagrees. During the National ADAP Task Force negotiations with eight major drug manufacturers (Roche, Gilead, Merck, Glaxo-Smith-Kline, Bristol Myers Squibb, Pfizer, and Abbott), top management from all eight companies offered more assistance from their patient assistance programs and also offered to streamline their application processes to help with the current national ADAP financial crisis. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter proposed a statewide workgroup be created to recommend a variation on cost-containment measures rather than sticking to the ones mentioned in the proposed rule changes.

Response: The department disagrees. A thirty day written comment period, two public hearings, and 19 town-hall meetings were conducted throughout the state to collect public comments on the proposed rules. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter hoped that the program would give at least three months advance notice to clients prior to implementing cost containment measures, in order to allow clients time to secure alternate resources.

Response: The department agrees. The department has convened a statewide work group to assist in developing procedures for implementing proposed cost-containment measures. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter expressed concern that the department has a legal and ethical obligation to ensure that program clients are not terminated from the program as a result of changes to the eligibility criteria. The commenter said the proposed rule changes indicate that such terminations could occur, which would violate the right to due process guaranteed under the Fourteenth Amendment of the U.S. Constitution, as well as the estoppel doctrine, a legal principle adopted by Texas courts.

Response: The department disagrees. The subsection in §98.115(d) has been added to clarify that if and when a cost-containment measure(s) is implemented, the measure will be applied to clients enrolling in the program after the date the measure was implemented. Clients currently enrolled in the program will not be affected by the implementation of a cost-containment measure.

Comment: Concerning the rules in general, numerous commenters expressed concern that clients denied services will become sick and require hospitalization in public hospitals and indigent care facilities, thus increasing the amount spent on healthcare for each person.

Response: The department disagrees. Clients denied services will have to identify other resources in the community (Pharmaceutical Patient Assistance Programs, Hospital Districts, additional Ryan White Funding) already within their communities to assist in accessing medications. No change was made as a result of this comment.

Comment: Concerning the rules in general, numerous commenters expressed concern that the clients who are "disqualified" from receiving services would shift the public health burden to local communities who lack funding to support such a volume of services.

Response: The department disagrees. While the burden of ineligible clients may be shifted to local communities, the overwhelming majority of the program's clients reside in Ryan White Title I EMAs. These EMAs receive direct federal funding to provide HIV-related services for clients including medication assistance. No change was made as a result of this comment.

Comment: Concerning the rules in general, numerous commenters expressed concern that lapses in medication therapy coverage while attempting to obtain services from alternate resources would jeopardize patient health, leading to drug-resistant strains of HIV, increased viral loads that would serve to increase the transmission of HIV to others, and a higher mortality rate due to lack of treatment.

Response: The department disagrees. Increased viral loads do not lead to the transmission of HIV to others. Unsafe sexual practices and/or intravenous drug use with contaminated needles are the behaviors that lead to HIV transmission. Clients denied services from the program should identify resources within their community to assist them with accessing needed medications. No change was made as a result of this comment.

Comment: Concerning the rules in general, numerous commenters expressed concern that the working poor would be hardest hit by the proposal; their inability to receive additional services would cause them to become too sick to work and lose their jobs, making them eligible for additional public assistance while shrinking the taxpayer base.

Response: The department agrees. The department has reconsidered the financial eligibility criteria and has decided to continue providing for an adjustment to a client's annual gross income; therefore, §98.109(b) has been amended to allow for the annual gross income adjustment.

Comment: Concerning the rules in general, numerous commenters expressed concern that the proposal discourages people recovering from illness to actively seek reemployment, for fear of losing their eligibility to access medications.

Response: The department disagrees. The rules are designed to serve persons most in need of assistance while staying within the budget. No change was made as a result of this comment.

Commenters in favor of the rules were: None.

The comments received during the comment period were overwhelmingly opposed to any and all of the proposed rule changes. Although a few of the commenters expressed their understanding regarding the financial issues facing the department, none of the 1,016 comments received could be interpreted as actually favorable towards the proposed rules. Two client advocacy organizations expressed concerns over the specific wording of the various sections and submitted suggestions for alternate language concerning specific provisions in the rules. Commenters opposed to the rules were: the Texas AIDS Network, and the Lambda Legal Defense and Education Fund National Headquarters.

Commenters neither for nor against the rules were: None.

25 TAC §§98.101 - 98.115, 98.117 - 98.119

The amendments and new sections are adopted under the Health and Safety Code, §85.063, which provides the Texas Board of Health (board) with the authority to adopt rules necessary to establish eligibility guidelines to ensure the most appropriate distribution of funds; §85.016, which provides the board with the authority to adopt rules necessary to implement Subchapters A - F of Chapter 85, Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection; and §12.001, which provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

§98.101. Purpose.

This subchapter establishes procedures and eligibility guidelines for the Texas HIV Medication Program (program) as required in the Health and Safety Code, §85.063. The program, established under the authority of the Health and Safety Code, Chapter 85, Subchapter C, HIV Medication Program, provides prescription drugs to low-income individuals with HIV disease. Hospital districts, local health departments, public or nonprofit hospitals and clinics, and nonprofit community organizations may request assistance from the program with obtaining public health pricing for medications to treat individuals with HIV disease.

§98.102. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AIDS--Acquired immune deficiency syndrome as defined by the Centers for Disease Control and Prevention.

(2) Board--The Texas Board of Health.

(3) Client--An individual who, under these sections, is determined by a program to be eligible for services.

(4) Commissioner--The commissioner of health.

(5) Department--The Texas Department of Health.

(6) Eligible Metropolitan Area--A metropolitan area that is eligible to receive direct federal funding as defined in 42 U.S.C. 300ff-17.

(7) HIV--Human immunodeficiency virus infection as defined by the Centers for Disease Control and Prevention.

(8) Legally responsible person--A parent, managing conservator, or other person that is legally responsible for the support of a minor, a ward, or himself/herself.

(9) Minor--A person who has not reached his or her 18th birthday and who has not been emancipated by a court or who is not married or recognized as an adult by the State of Texas.

(10) Program--The Texas HIV Medication Program established under the Health and Safety Code, Chapter 85, Subchapter C.

(11) Services--Activities determined by the department as appropriate to carry out the intent of, Health and Safety Code, Chapter 85, Subchapter C.

(12) Texas resident--An individual who physically resides within the geographic boundaries of the state.

§98.106. General Eligibility Criteria.

A person is eligible to participate in the program if the person applying to the program:

(1) meets the medical eligibility criteria in §98.107 of this title (relating to Medical Eligibility Criteria);

(2) meets the residency eligibility criteria in §98.108 of this title (relating to Residency Eligibility Criteria);

(3) meets the financial eligibility criteria in §98.109 of this title (relating to Financial Eligibility Criteria);

(4) requests assistance in obtaining medications provided under the program; and

(5) submits a complete application for assistance as described in §98.110 of this title (relating to Application Process).

§98.107. Medical Eligibility Criteria.

(a) A person is medically eligible to participate in the program if the person applying to the program:

(1) provides evidence that the applicant has a diagnosis from a licensed physician of HIV disease; and

(2) is under the care of a physician licensed to practice in Texas who prescribes the medications.

(b) Exceptions to the Medical Eligibility Criteria can be made at the discretion of the Chief of the Bureau of HIV and STD Prevention.

§98.109. Financial Eligibility Criteria.

(a) A person is financially eligible for the program if he or she:

(1) is not covered for approved program medication(s) under the Texas Medicaid Program, or has exhausted Medicaid pharmacy benefits for the given month;

(2) does not qualify for assistance or receives less than full coverage for approved program medication(s) under any State compensation program or under any other state or federal health benefits program;

(3) is not covered under an insurance policy or is otherwise underinsured for prescription drugs; and

(4) has an annual gross income (minus the adjustments described in subsection (b) of this section) that does not exceed 200% of the most recently published federal poverty income guidelines.

(b) Formula for adjusting annual gross income.

(1) An applicant's annual gross income (if single), or the combined annual gross income of the applicant and his or her spouse, minus the program's cost of the prescribed medication(s).

(2) For a minor child, the (combined) annual gross income of the child's parent(s), minus the program's cost of the prescribed medication(s). Only the income of the parent(s) living in the same household as the child at the time of application or recertification will be used to determine financial eligibility.

(3) For an emancipated minor, financial eligibility is determined as set forth in paragraph (1) of this subsection.

(c) The department shall annually verify the financial status of an enrolled client to determine if the client is continuing to meet the financial eligibility criteria of the program.

§98.110. Application Process.

(a) To request an application packet, call toll-free 1-800-255-1090 or write to: Texas Department of Health, Bureau of HIV and STD Prevention, Texas HIV Medication Program, 1100 West 49th Street, Austin, Texas 78756-3199. The program's client application for assistance is also available online at the following URL: http://www.tdh.state.tx.us/hivstd/meds/document.htm.

(b) Submit completed applications along with certification forms to: Texas Department of Health, Bureau of HIV and STD Prevention, Texas HIV Medication Program, 1100 West 49th Street, Austin, Texas 78756-3199.

(c) The applicant is expected to give informed consent to the department so that the program may contact an applicant, client, or medical provider to verify information contained in the application or to request additional supporting documentation pertaining to the application for enrollment or recertification purposes.

§98.112. Program Distribution of Medications.

(a) The department will contract with a pharmaceutical wholesaler for purchase of drugs. The Texas Department of Health, Pharmacy Division, will distribute drugs to pharmacies participating in the program and a mail order pharmaceutical distributor for the dispensing of drugs directly to clients who reside outside areas covered by participating pharmacies.

(b) Program funds must be used as payor of last resort and coordinated with other local, state, and federal funds, including Medicaid.

§98.114. Prescription Fees.

A dispensing fee may be collected by a participating pharmacy for each prescription dispensed in accordance with the existing Memorandum of Agreement with the department. Medicaid clients will have their dispensing fees paid for by the program.

§98.115. Fiscal Planning.

(a) To ensure the program's expenditures do not exceed the program's budget, the department will analyze program expenditures as follows.

(1) Determine the annual average client cost using program expenditures from the previous 12 months. The annual average client cost is calculated by dividing the total amount of funds expended during

a 12-month period into the total number of clients served during the same 12-month period.

(2) Project the number of clients that may be served during the next 12-month period using current budget figures. The projected number of clients that may be served is calculated by dividing the program's total available dollars by the annual average client cost derived from paragraph (1) of this subsection.

(b) The department will perform an analysis of program expenditures every month using the methodology in subsection (a) of this section to determine if funds are sufficient to meet projected expenditures.

(c) To insure that expenditures do not exceed the program's budget, the department may implement the following temporary cost-containment measures as necessary.

(1) Cost-containment measures may be implemented in the following order.

(A) Initiate medical criteria to meet at minimum the most recent Federal Department of Health and Human Services Guidelines for the Use of Antiretroviral Agents in HIV-Infected Adults and Adolescents. Present medical criteria is a CD4 +T-cell count at or below 350 cells per cubic millimeter and/or an HIV viral load greater than 30,000 copies per milliliter when using the branched DNA test or more than 55,000 copies per milliliter when using the RT-PCR test.

(B) Discontinue using the formula for adjusting the clients' gross annual income described in §98.109(b) of this title (relating to Financial Eligibility Criteria.)

(C) Lower the financial eligibility criteria described in §98.109(a)(4) of this title to a level that is not lower than 125% of federal poverty level.

(D) Cease enrollment of new clients.

(2) As funds become available, the department will rescind the cost-containment measures in the reverse order of which they were implemented.

(d) Cost-containment measures, if implemented, will be applied to clients enrolling after the cost-containment measure(s) is implemented.

§98.117. Denial of Application or Termination of Client Benefits.

(a) Individuals already receiving services will have their application denied or services terminated only for one or more of the following reasons.

(1) Services will be denied or terminated if:

(A) the person is not a resident of the state as required in §98.108 of this title (relating to Residency Eligibility Criteria);

(B) the annual gross income does not meet the criteria set in §98.109 of this title (relating to Financial Eligibility Criteria);

(C) the person does not provide evidence to meet the criteria set in §98.107 of this title (relating to Medical Eligibility Criteria); or

(D) the client notifies the program in writing that he/she no longer wants to receive services.

(2) Services may be terminated if:

(A) the applicant or client submits an application form or any document required in support of the application which contains a misstatement of fact which is material to determining program eligibility;

(B) the client submits false claims to a participating pharmacy;

(C) the client has not requested or used services during any period of six consecutive months;

(D) program funds are exhausted.

(b) Denial, modification, suspension, or termination of services to a client will be governed by the procedures required by §98.118 of this title (relating to Appeal Procedures), and §98.119 of this title (relating to Exceptions from Appeal Procedures).

§98.119. Exceptions from Appeal Procedures.

The department is not required to offer an opportunity to dispute the decision to deny or terminate client status if the department's actions result from the exhaustion of funds appropriated to the department for purposes authorized under Health and Safety Code, Chapter 85, Subchapter C, Texas HIV Medication Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304926
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 28, 2003
Proposal publication date: May 23, 2003
For further information, please call: (512) 458-7236

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25 TAC §§98.107 - 98.117

The repeals are adopted under the Health and Safety Code, §85.063, which provides the Texas Board of Health (board) with the authority to adopt rules necessary to establish eligibility guidelines to ensure the most appropriate distribution of funds; §85.016, which provides the board with the authority to adopt rules necessary to implement Subchapters A - F of Chapter 85, Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection; and §12.001, which provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304928
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 28, 2003
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CHAPTER 130. CODE ENFORCEMENT REGISTRY

25 TAC §§130.1 - 130.18, 130.20

The Texas Department of Health (department) adopts amendments to §§130.1 - 130.18, and 130.20, concerning the registration of code enforcement officers. Sections 130.3 and 130.20 are adopted with changes to the proposed text as published in the April 18, 2003, issue of the *Texas Register* (28 TexReg 3201). Sections 130.1 - 130.2 and 130.4 - 130.18 are adopted without changes and, therefore, the sections will not be republished.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 130.1-130.18 and 130.20 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist.

A Notice of Intent to Review for the sections, regarding Government Code, §2001.039, agency review of rules, was published in the February 12, 1999, issue of the *Texas Register* (24 TexReg 1003). No comments were received due to the publication of this notice.

The amendments update references to the Act as codified in Texas Occupations Code, Chapter 1952; update references to other codified laws; clarify existing language; and remove obsolete language. Minor amendments to wording in several sections for which no substantive change is indicated allow the sections to be published in their entirety. Amendments to §130.20 expand the list of activities approved for continuing education to include initial certification in related disciplines.

Three comments were received from individuals and were generally in favor of the rules. However, the commenters had questions and/or offered suggestions. Following each comment is the department's response and any resulting change(s).

Comment: One commenter requested that §130.12 be amended to allow registrants to renew once every two years instead of annually. Response: The department disagrees. The requirement for annual renewal is established in statute at Occupations Code, §1952.05. No change was made as a result of the comment.

Comment: Concerning §130.20, one commenter expressed support for the continuing education requirement included in the rules as proposed.

Response: The department considered the comment. No change was made as a result of the comment.

Comment: One commenter requested that the requirement for continuing education at §130.20 be changed to require six hours every four years.

Response: The department disagrees. The current annual requirement for six hours of continuing education, including at least one hour of legal/legislative updates, was developed in cooperation with all stakeholders, and has been successfully implemented in the last two years. The proposed change would lower the standard required for annual renewal to only 1.5 hours annually. No change was made as a result of the comment.

Comment: One commenter requested that the National Certified Pool Operators certification course be added to the list of initial certifications accepted under §130.20(q).

Response: The department agrees and has added a new paragraph to §130.20(q)(5).

The following changes were due to department staff comments.

Change: Concerning §130.20(b), a closing parenthesis was added after the word "Renewal".

Change: Concerning §130.3, standard language was added relating to the operation of the advisory committee to include the continuance of the committee until September 1, 2007; language was revised concerning the election of officers; additional requirements were included regarding statements by members; and clarification of the components that the committee must include in an annual report to the Board of Health (board).

The amendments are adopted under the Occupations Code, Chapter 1952; Government Code, §2110.005, which requires the department to adopt rules stating the purpose and tasks of its advisory committees; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

§130.3. Code Enforcement Officers' Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the advisory committee shall be the Code Enforcement Officers' Advisory Committee (committee).

(2) The committee is established under the Health and Safety Code, §11.016 which allows the Texas Board of Health (board) to establish advisory committees.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the board in the area of rules regarding code enforcement officers.

(d) Tasks.

(1) The committee shall advise the board concerning rules relating to registered code enforcement officers.

(2) The committee shall advise the department concerning the registration of code enforcement officers.

(3) The committee shall carry out any other tasks given to the committee by the board.

(e) Review and duration. By September 1, 2007, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of seven members appointed by the board. The composition of the committee shall include:

(1) three registered code enforcement officers;

(2) one structural engineer or licensed architect;

(3) two consumers, one of which must be a certified building official; and

(4) one person involved in the education and training of code enforcement officers.

(g) Terms of office. The term of office of each member shall be six years. Members shall serve after expiration of their term until a replacement is appointed.

(1) Members shall be appointed for staggered terms so that the terms of a substantial equivalent number of members will expire on December 31st of each odd-numbered year.

(2) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(h) Officers. The committee shall elect from its members a presiding officer and an assistant presiding officer to begin serving on September 1 of each odd-numbered year.

(1) Each officer shall serve until the next regular election of officers.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled by vote of the committee.

(5) A member shall serve no more than two consecutive terms as presiding officer or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

(1) A meeting may be called by agreement of Texas Department of Health (department) staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the sitting members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(k) Staff. Staff support for the committee shall be provided by the department.

(l) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff.

(A) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the advisory committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member should not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member should not disclose confidential information acquired through his or her committee membership.

(5) A committee member should not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee shall publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the board, the status of any rules which were recommended by the committee to the board, and anticipated activities of the committee for the next year.

(2) The report shall identify the costs related to the committee's existence, including the cost of department staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(3) The report shall cover the meetings and activities in the preceding 12 months and shall be filed with the board each September. It shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No compensatory per diem shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by department staff.

§130.20. Continuing Education.

(a) Each registered code enforcement officer and code enforcement officer in training must meet the renewal requirements set out in this section.

(b) Code enforcement officers in training who apply to upgrade prior to the department's issuance of notice regarding the expiration of their registration as required by §130.12(c)(1) of this title (relating to Code Enforcement Registration Renewal) are not required to submit continuing education hours in order to upgrade.

(c) Each registered code enforcement officer and code enforcement officer in training must obtain and show proof of not less than six continuing education hours as set forth in this section within the twelve months preceding renewal of their registration, at least one hour of which must be in legal/legislative issues as provided in subsection (j)(12) of this section.

(d) Only continuing education activities conducted in accordance with this section shall be considered approved by the department and may be represented to the public as acceptable for registration renewal for registered code enforcement officers in Texas.

(e) Department approved continuing education activities for license renewal include the following:

(1) conferences;

(2) home-study training modules (including professional journals requiring successful completion of a test document);

(3) lectures;

(4) panel discussions;

(5) seminars;

(6) accredited college or university courses;

(7) video or film presentations with live instruction;

(8) field demonstrations;

(9) teleconferences; or

(10) other activities approved by the department.

(f) Only the following continuing education activities shall serve as a basis for registration renewal:

(1) approved by the department or its designee in accordance with this section; or

(2) approved by another professional regulatory agency in the State of Texas as acceptable continuing education for license renewal; and

(3) covering one or more of the curriculum areas listed in subsection (j) of this section.

(g) Continuing education activities must meet the following criteria if they are to be acceptable for continuing education credit:

(1) the activity must cover one or more of the curriculum areas listed in subsection (j) of this section;

(2) the activity must be conducted by an organization which is:

(A) an accredited college or university;

(B) a governmental agency, including local, state or federal agencies;

(C) an association with a membership of 25 or more persons, or it's affiliate; or

(D) a commercial education business;

(3) the activity must have a record keeping procedure which includes a register of who took the course and the number of continuing education units earned;

(4) the organization must implement procedures for verifying participant's attendance;

(5) the activity must be at least 50 minutes in length of actual instruction time. Round table discussions and more than one speaker for the total of 50 minutes per activity is permissible. No credit will be given for time used for other non-relevant activities; and

(6) the activity must be conducted in compliance with all applicable federal and state laws, including the Americans with Disabilities Act (ADA) requirements for access to activities.

(h) Organizations shall send, e-mail, or fax notification of upcoming continuing education to the department at least 15 days prior to the event which includes the:

(1) date(s) of the continuing education activity;

(2) time of the continuing education activity ;

(3) location of the continuing education activity;

(4) title of the activity; and

(5) name of the instructor(s).

(i) Commercial education businesses, in addition to the items listed in subsection (h) of this section, shall submit a request for approval on department forms; and shall not represent any course as approved until such approval is granted by the department in writing.

(j) The curriculum of an approved activity must include one or more of the following subjects:

(1) zoning and zoning ordinance enforcements;

(2) sign regulations;

(3) home occupations;

(4) housing codes and ordinances;

(5) building abatement;

(6) nuisance violations;

(7) abandoned vehicles;

(8) junk vehicles;

(9) health ordinances;

(10) basic processes of law related to code enforcement;

(11) professional, supervisory or management training related to the profession of code enforcement; or

(12) legislative or legal updates related to the profession of code enforcement.

(k) Documentation of continuing education activity shall be maintained by the organization for three years, including:

(1) a roster which shall include the following:

(A) name, address, phone number, code enforcement officer or code enforcement officer in training registration number, social security number (used to coordinate continuing education activity information with the department's records), and signature of the registrant; and

(B) number of continuing education hours earned by each individual;

(2) copy of notification and description of method transmitted to the department as required by subsection (h) of this section; and

(3) copies of all program materials sufficient to demonstrate compliance with this section.

(l) At the conclusion of the activity the organization shall distribute to those registered code enforcement officers and code enforcement officers in training who have successfully completed the activity a certificate of completion which shall include the name of the registrant; the name of the organization providing the training, the title of the activity; the date and location of the activity, and the continuing education hours earned. The certificate shall state "Approved in accordance with 25 Texas Administrative Code, §130.20 for code enforcement officer/code enforcement officer in training registration renewal in Texas." It shall include a breakdown of the hours earned on each topic listed under subsection (j) of this section.

(m) Each registered code enforcement officer and code enforcement officer in training shall collect and keep certificates of completion of approved courses. These certificates of completion will be used to document the attendance of a registered code enforcement officer or code enforcement officer in training at approved courses. The department will conduct random audits for compliance with this requirement.

(n) Failure to comply with the annual continuing education hour requirements for the registered code enforcement officer or code enforcement officer in training registration issued by the department will:

(1) result in suspension of a code enforcement officer or code enforcement officer in training registration until the necessary credits for continuing education are successfully completed; and

(2) require the registered code enforcement officer or code enforcement officer in training to make new application for registration as a code enforcement officer or code enforcement officer in training, if the registered code enforcement officer or code enforcement officer in training does not renew within one year after the original registration expired.

(o) The department may fail to accept any or all courses for registration renewal if an organization fails to file a timely notice of upcoming continuing education, fails to retain documentation related to the activity as required by this section, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(p) A registered code enforcement officer or code enforcement officer in training registration may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 30 days, shall be granted by the department if the registered code enforcement officer or code enforcement officer in training files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(q) Initial certification in the 12 months preceding renewal will be accepted as proof of the continuing education required by subsection (c) of this section if the certification is listed as follows.

(1) International Code Council (ICC):

(A) residential building inspector;

(B) residential electrical inspector;

(C) residential mechanical inspector;

(D) residential plumbing inspector;

(E) commercial building inspector;

(F) commercial electrical inspector;

(G) commercial mechanical inspector;

(H) commercial plumbing inspector;

(I) fire inspector I;

(J) fire inspector II;

(K) residential combination inspector;

(L) commercial combination inspector;

(M) certified building official;

(N) accessibility inspector;

(O) zoning inspector;

(P) property maintenance and housing inspector; or

(Q) housing code official; or

(2) International Association of Plumbing and Mechanical Officials (IAPMO):

(A) voluntary plumbing inspector; or

(B) voluntary mechanical inspector; or

(3) National Fire Protection Association (NFPA):

(A) certified fire protection specialist;

(B) fire inspector I;

(C) fire inspector II;

(D) certified building inspector;

(E) certified residential electrical inspector; or

(F) certified master electrical inspector; or

(4) International Association of Electrical Inspectors (IAEI):

(A) building 1 & 2 family dwelling;

(B) building general;

(C) electrical 1 & 2 family dwelling;

(D) electrical general;

(E) fire protection general;

(F) fire protection plan review;

(G) mechanical 1 & 2 family dwelling;

(H) mechanical general;

(I) plumbing 1 & 2 family dwelling; or

(J) plumbing general or;

(5) National Swimming Pool Foundation (NSPF) certified pool-spa operator.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304984

Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 145. NURSING FACILITIES AND RELATED INSTITUTIONS
SUBCHAPTER H. LONG-TERM CARE SERVICES FOR THE ELDERLY

25 TAC §145.121

The Texas Department of Health (department) adopts the repeal of §145.121, concerning a memorandum of understanding between the department and the Texas Department on Aging, the Texas Department of Human Services, and the Texas Mental Health and Mental Retardation for long term care services for the elderly without changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4045) and will not be republished.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §145.121 and has determined that reasons for adopting the section no longer exist.

The department published a Notice of Intention to Review for §145.121 in the *Texas Register* on February 12, 1999 (24 TexReg 1003). No comments were received due to publication of this notice.

The department adopts the repeal of §145.121 because there is no statutory requirement for the department to adopt a rule pertaining to a memorandum of understanding between the department and the Texas Department on Aging, the Texas Department of Human Services, and the Texas Mental Health and Mental Retardation for long term care services for the elderly.

No comments were received on the proposal during the comment period.

The repeal is adopted under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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CHAPTER 221. MEAT SAFETY ASSURANCE
SUBCHAPTER B. MEAT AND POULTRY INSPECTION

25 TAC §221.15

The Texas Department of Health (department) adopts an amendment to §221.15, concerning meat and poultry inspection. Section 221.15 is adopted without changes to the proposed text as published in the March 14, 2003, issue of the *Texas Register* (28 TexReg 2240) and, therefore, the section will not be republished. The amendment clarifies how inedible by-products are to be handled and the requirements for field slaughter and processing of exotic wild game animals.

Under the proposed changes, inedible by-products are no longer required to be placed in containers marked with the word "INEDIBLE" if they will not be removed from the premises. However, the handling of inedible by-products must be in a manner that does not result in insanitary conditions or attract insects, vermin, or other pests. If inedible by-products are to be removed from the premises for disposal or rendering, they must be adequately denatured to preclude their use in human food and placed in containers conspicuously marked "INEDIBLE."

The Health and Safety Code, Chapter 433, requires inspection of each livestock animal before it is allowed to enter a processing establishment. Farm or ranch raised domestic livestock are examined while at rest and in motion before entering the slaughter department of a processing establishment. Due to their wild nature, exotic livestock raised under free-range natural wildlife conditions cannot always be presented for ante-mortem inspection. Trapping and holding or transporting these animals is not practical. Under field conditions, there may not be an opportunity to observe the animals in rest, in motion, and from both sides.

Current harvesting practice includes harvesting the animals with the aid of a helicopter. The game are located in the brush and chased out into an opening where they are killed by a single shot to the head or neck. It is not beneficial to the inspection process to observe animals that are fleeing. It is beneficial to examine the freshly killed animal to ensure that the body condition is that of a healthy animal and to determine that the animal was indeed killed by being shot.

Historical data from more than ten years of harvesting exotic wild game and the nature of the species indicate that exotic wild game available for slaughter in their natural environment are very low risk for disease. Exotic wild game has been harvested under inspection from Texas ranches since 1989 and none of the game has ever been condemned for health reasons or disease conditions observed during ante-mortem inspection.

When exotic game animals are harvested in their natural environment, unhealthy animals are not expected to be presented or available for harvesting. By nature, as a matter of survival, animals that are unhealthy will not show signs of illness or give indication that they are weaker than the rest of the herd. Predators generally select weak animals as an easy target. Those animals that are injured or ill enough to be symptomatic generally hide themselves until they recover or die.

There were no comments received during the 30-day comment period.

The amendment is adopted under the Health and Safety Code, Chapter 433, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 433; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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CHAPTER 229. FOOD AND DRUG
SUBCHAPTER H. SEAFOOD HACCP

25 TAC §§229.121 - 229.129

The Texas Department of Health (department) adopts amendments to §§229.121 - 229.129, concerning seafood Hazard Analysis Critical Control Point (HACCP). Section 229.124 is adopted with changes to the proposed text as published in the April 18, 2003, issue of the *Texas Register* (28 TexReg 3204). Sections 229.121 - 229.123 and §§229.125 - 229.129 are adopted without changes to the proposed text and, therefore, the sections will not be republished.

Amendments to §229.121 and §229.122 add references to §§229.211 - 229.222 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food). An amendment to §229.123 updates a mailing address for the U.S. Food and Drug Administration. An amendment to §129.124 updates verbiage for consistency within the sections. An amendment to §229.125 inserts language for clarification. Amendments to §229.126 and §229.127 move one section to a more appropriate location. Amendments to §229.128 and §229.129 update verbiage for consistency within the sections.

Government Code, §2001.039, requires each state agency to conduct a review of its rules every four years and consider for readoption each rule adopted by that agency. Sections 229.121 - 229.129 have been reviewed and the department has determined that reasons for adopting the sections continue to exist; however the rules needed revisions as described in this preamble.

The department published a Notice of Intention to Review for §§229.121 - 229.129 in the *Texas Register* on March 2, 2001 (26 TexReg 1876). No comments were received as a result of the publication of this notice.

No comments were received on the proposal during the comment period.

The department is making the following change due to staff comments.

Change: Concerning §229.124, a "semicolon" replaced the "period" at the end of subsection (c)(2).

The amendments are adopted under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

§229.124. Corrective Actions.

(a) Whenever a deviation from a critical limit occurs, a processor shall take corrective action either by:

(1) following a corrective action plan that is appropriate for the particular deviation; or

(2) following the procedures in subsection (c) of this section.

(b) Processors may develop written corrective action plans, which become part of their HACCP plan in accordance with §229.123(c)(5) of this title (relating to Hazard Analysis and Hazard Analysis Critical Control Point (HACCP) Plan), by which they predetermine the corrective actions that they will take whenever there is a deviation from a critical limit. A corrective action plan that is appropriate for a particular deviation is one that describes the steps to be taken and assigns responsibility for taking those steps, to ensure that:

(1) no product enters commerce that is either injurious to health or is otherwise adulterated as a result of the deviation; and

(2) the cause of the deviation is corrected.

(c) When a deviation from a critical limit occurs and the processor does not have a corrective action plan that is appropriate for that deviation, the processor shall:

(1) segregate and hold the affected product, at least until the requirements of paragraphs (2) and (3) of this subsection are met;

(2) perform or obtain a review to determine the acceptability of the affected product for distribution. The review shall be performed by an individual or individuals who have adequate training or experience in the affected product to perform such a review;

(3) take corrective action, when necessary, with respect to the affected product to ensure that no product enters commerce that is either injurious to health or is otherwise adulterated as a result of the deviation;

(4) take corrective action, when necessary, to correct the cause of the deviation;

(5) perform or obtain timely reassessment by an individual or individuals who have been trained in accordance with §229.127 of this title (relating to Training), to determine whether the HACCP plan needs to be modified to reduce the risk of recurrence of the deviation, and modify the HACCP plan as necessary.

(d) All corrective actions taken in accordance with this section shall be fully documented in records that are subject to verification in accordance with §229.125(a)(3)(B) of this title (relating to Verification) and the record keeping requirements of §229.126 of this title (relating to Records).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

SUBCHAPTER O. LICENSING OF WHOLESALE DISTRIBUTORS OF DRUGS--INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §229.255

The Texas Department of Health (department) adopts the repeal of §229.255, concerning the Wholesale Drug Distributors Advisory Committee (committee), without changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4049) and will not be republished. The committee has provided advice to the Texas Board of Health (board) and the department in the area of licensing of wholesale drug distributors.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 2002, the board established a rule relating to the Wholesale Drug Distributors Advisory Committee. The rule states that the committee will automatically be abolished on September 1, 2003, and the board has determined that the committee should be abolished on that date. Issues relating to the type of advice previously provided by the committee are better addressed through the establishment of ad hoc workgroups.

A comment was received from a representative of the Healthcare Distribution Management Association and was not in favor of abolishing the committee.

Comment: The commenter requested that the committee be continued stating that the committee serves an important function in the determination and development of regulatory strategies designed to ensure the safe distribution of pharmaceutical and health care products in Texas. The commenter is concerned that ad hoc workgroups would not be specifically familiar with drug distribution and not directly affected by rules.

Response: The department disagrees. The department believes that the ability to create ad hoc workgroups with membership specific to the issue will allow the department to better meet the needs of the public. The current committee last met in 2001. No change was made as a result of the comment.

The repeal is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the

agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
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SUBCHAPTER X. LICENSURE OF DEVICE DISTRIBUTORS AND MANUFACTURERS

25 TAC §229.444

The Texas Department of Health (department) adopts an amendment to §229.444, concerning the Device Distributors and Manufacturers Advisory Committee (committee). The section is adopted without changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4049), and the section will not be republished.

The committee has provided advice to the Texas Board of Health (board) and the department in the area of licensure of device distributors and manufacturers. The committee is established under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; and the Health and Safety Code, §431.275, which requires the establishment of the committee. The committee is subject to Government Code, Chapter 2110, concerning state agency advisory committees.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §229.444 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review for §229.444 in the *Texas Register* on September 28, 2001 (26 TexReg 7581). No comments were received due to publication of this notice.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1999, the board established a rule relating to the Device Distributors and Manufacturers Advisory Committee. The rule states that the committee will automatically be abolished on September 1, 2003. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until September 1, 2007.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to: continue the committee until September 1, 2007; include additional requirements regarding statements by members; and clarify the components that the committee must include in an annual report to the board.

No public comments were received during the comment period for the rule.

The amendment is adopted under Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner; Health and Safety Code, §431.275, which requires the establishment of the committee; and Government Code, §2110.005, which requires the department to adopt rules stating the purpose and tasks of its advisory committees. The review of this rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
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CHAPTER 265. GENERAL SANITATION
SUBCHAPTER K. REGISTRATION OF SANITARIANS

The Texas Department of Health (department) adopts amendments to §§265.141-265.149, 265.151-265.158, new §265.159, and the repeal of §265.150, concerning the registration of sanitarians. The amendments to §§265.142, 265.144, 265.147, 265.149, and new §265.159 are adopted with changes to the proposed text as published in the April 18, 2003, issue of the *Texas Register* (28 TexReg 3206). The amendments to §§265.141, 265.143, 265.145 - 265.146, 165.148, 265.151 - 265.158, and the repeal of §265.150 are adopted without changes and, therefore, the sections will not be republished.

Government Code, §2001.039 requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 265.141-265.149 and 265.151-265.158 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist. Section 265.150 has been reviewed and the department has determined that the reason for adopting the section no longer exists, and the section has been repealed.

A Notice of Intent to Review in regards to Government Code, §2001.039, agency review of rules was published in the March 14, 2003, issue of the *Texas Register* (27 TexReg 2638). No comments were received due to the publication of this notice.

The amendments update references to the Act as codified in the Texas Occupations Code, Chapter 1953 (the Act); update references to other codified laws; clarify existing language; and remove obsolete language. Minor amendments to wording in several sections for which no substantive change is indicated are also being adopted to allow the sections to be published in their entirety.

Amendments to §§265.142 and 265.145 and the repeal of §265.150 eliminate an obsolete and unworkable requirement for preceptorship for persons not required by the Act.

Amendments to §265.143 (related to Fees) and new §265.159 (related to Exemption from Renewal and Continuing Education for Retired Professional Sanitarians) provide a voluntary status for retired professional sanitarians.

Comments were received from the Registered Sanitarian Advisory Committee and five individuals. The comments received were generally favorable of the rules as proposed; however, many of the commenters had questions or specific concerns, and/or offered suggestions for changes.

Comment: One commenter requested that "bioterrorism training" be included in §265.142 as a part of the definition of "environmental health or consumer health and sanitation".

Response: The department agrees and has amended §265.142(12) to include "bioterrism".

Comment: Three commenters stated that they supported the exemption for retired sanitarians provided by new §265.159.

Response: The department appreciated the comments. No change was necessary as a result of the comments.

Comment: One commenter requested that §265.143 be modified so that no fee is assessed for the retired sanitarian exemption. .

Response: The department disagrees. The proposed fee will offset the costs to the department associated with verifying the sanitarian's eligibility for the exemption; issuing the exemption certificate; and maintaining a record of the exemption. No change was made as a result of this comment.

Comment: One commenter requested that §265.143 be modified so that a $25 fee every two years is assessed for the retired sanitarian exemption, in place of the proposed one-time $150 fee.

Response: The department disagrees. The proposed one-time fee will offset the costs to the department associated with a one-time application for the exemption, after which the rules as proposed exempt the retired sanitarian from submitting further renewal forms or fees. Requiring the department to bill and process the smaller fee every two years would impose additional costs on the department which would not be offset by the proposed change in fees. No change was made as a result of this comment.

Comment: One commenter requested that §265.159 be modified to permit a retired sanitarian to use the title "Emeritus" or "RS-E".

Response: The department disagrees. The rules as proposed clearly distinguish a retired sanitarian from a sanitarian currently working in the field. Additionally, the title "RS-E" might be misleading to the public. No change was made as a result of this comment.

Comment: One commenter proposed that an RS be permitted to return to active practice by submitting proof of the total number of continuing education hours he or she would have needed to earn for each year on exempt status.

Response: The department disagrees. The rules as proposed do not permit a retired sanitarian to return to active practice unless he or she meets the then current requirements for registration, including number of hours of science completed and passing the examination. No change was made as a result of this comment.

Comment: One commenter requested that sanitarians who have retired from active practice and are faculty members at universities or institutions of higher learning be permitted to hold a "Retired" or "Emeritus" status under §265.159.

Response: The department disagrees. The rules as proposed already permit faculty members who are not employed in the fields of environmental or consumer health to apply for the exemption. However, if an individual is employed in a field where holding an RS conveys information regarding that individual's qualifications in that field (e.g. teaching environmental health at a community college) the exemption for a "Retired Professional Sanitarian" would not be appropriate. No change was made as a result of the comment.

Comment: One commenter requested that the number of years of registration as a Professional Sanitarian required for an individual to be eligible for retired sanitarian status be increased from five to ten years.

Response: The department agrees and has amended §265.159(a) and (f)(2) accordingly.

The following changes were made due to comments by department staff.

Change: Minor editorial changes for punctuation and *Texas Register* format were made to §§265.142, 265.147, 265.149 and 265.159.

Change: New language was added at §265.159(d) to ensure that a registrant with a pending complaint would need to remain currently registered until the complaint was resolved before being approved for the exemption for retired sanitarians.

25 TAC §§265.141 - 265.149, 265.151 - 265.159

The amendments and new section are adopted under the Occupations Code, Chapter 1953; and the Health and Safety Code, §12.001, which provides the Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

§265.142. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings.

(1) Act--Occupations Code, Chapter 1953, concerning the registration of sanitarians.

(2) Administrator--The department employee designated as the administrator of registration activities authorized by the Act.

(3) Advanced mathematics--A mathematics course equivalent to or beyond calculus that was taken at an accredited college or university.

(4) Applicant--A person who applies for registration under the Act.

(5) Applied science--The application of general principles from environmental science, agricultural science, public health, epidemiology, food science, medical science, and sanitary engineering to solve problems.

(6) Basic Science--Science such as anatomy, bacteriology, biochemistry, biology, chemistry, geology, microbiology, pathology, physiology and physics.

(7) Board--The Texas Board of Health.

(8) Consumer health--The application of scientific knowledge to recognize, evaluate, and control hazards associated with the distribution of contaminated, adulterated, unsafe, and misbranded foods, drugs, medical devices, cosmetics, toys or consumer products.

(9) Continuing education unit--Fifty minutes of continuing education training or experience, applicable to consumer health, environmental health or sanitation and pre-approved by the department or its designee. Acceptable continuing education opportunities include conferences, home-study training modules (including professional journals requiring successful completion of a test document), lectures, panel discussions, seminars, accredited college or university courses, video or film presentations, field demonstrations or other activities pre-approved by the department or its designee.

(10) Department--The Texas Department of Health.

(11) Education--The educational requirements for registration as a sanitarian require a bachelor's degree from an accredited college or university with not less than 30 semester hours or its equivalent in basic or applied science.

(12) Environmental health or sanitation--The application of scientific knowledge to recognize, evaluate, and control environmental hazards and to preserve and improve environmental factors for the achievement of the health, safety, comfort, and well being of humans, to include response to suspected or known acts of bioterrorism.

(13) Examination--The examination prescribed by the department.

(14) Experience--Not less than two years of full-time experience in the fields of consumer health, environmental health or sanitation.

(15) Full-time experience--Employment, self-employment, or independent contracting for not less than thirty-two hours per week in the practice of consumer health, environmental health or sanitation.

(16) Natural Science--Branches of science such as physics, chemistry and biology that deal with matter, energy, and their interrelations and transformations or with objectively measurable phenomena.

(17) Registered sanitarian--A department registered public health professional qualified by specific education, specialized training and field experience to protect the health, safety and general welfare of the public from adverse environmental determinants.

(18) Registrant--A person registered under the Act.

(19) Registration--The procedure by which the department accepts, processes, and approves applications for registration of sanitarians including the furnishing, replacement or duplication of certificates.

(20) Sanitarian-in-Training--A person registered in accordance with §265.145(c) of this title (relating to Qualifications for Registration as a Sanitarian or Sanitarian-in-Training).

(21) Scope of professional practice--Includes, but not limited to, evaluating, planning, designing, managing, organizing, enforcing, or implementing programs, facilities, or services that protect public health and the environment. The scope of practice also includes educating, communicating, and warning communities of factors that may adversely affect the general health and welfare. The scope of practice may be in the areas of food quality and safety, on-site wastewater treatment and disposal, solid and hazardous waste management, ambient and indoor air quality, drinking and bathing water quality, insect and animal vector control, recreational and institutional facility inspections, consumer health and occupational health and safety.

§265.144. Application Procedures.

(a) Purpose. The purpose of this section is to set the application requests and procedures for registration as a sanitarian. Applications may be submitted for registration as a sanitarian or sanitarian-in-training.

(b) General.

(1) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official department forms.

(2) The department must receive all required application materials at least 30 days prior to the date the applicant wishes to take the examination, including the application fee.

(3) An application not completed within 30 days after the date of the department's notice of deficiency may be voided.

(c) General application materials. The application packet must contain the following items to be complete:

(1) specific information regarding personal data, social security number (used to coordinate information with the applicant's college or university transcript), birth date, place of employment, other state registrations and certifications held, and misdemeanor or felony convictions;

(2) the date of the application;

(3) the educational qualifications of the applicant (graduation with a bachelor's degree from an accredited college or university that included not less than 30 semester hours or its equivalent in a basic or applied science);

(4) qualifying experience;

(5) a statement that the applicant has read Occupations Code, Chapter 1953 (Act), and these rules and agrees to abide by them;

(6) a statement that the applicant shall return to the department any registration upon the expiration and nonrenewal, revocation, or suspension of the registration;

(7) a statement that the applicant understands that fees submitted in the registration process are nonrefundable unless the processing time is exceeded without good cause as set out in §265.156 of this title (relating to Processing Applications);

(8) a statement that the applicant understands that materials submitted in the registration process become the property of the department and are not returnable;

(9) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the applicant's qualifications may result in the voiding of the application, or denial or the revocation of any registration issued; and

(10) the signature of the applicant which has been dated and notarized.

(d) Documents. The following documents shall be submitted:

(1) a full-face photo of a minimum size of 1-1/2 by 1-1/2 inches signed on the reverse side with the applicant's signature as it appears on the application. The photograph must have been taken within the two-year period prior to application; and

(2) an official transcript from an accredited college or university (sealed as a true and exact copy of an unaltered original) showing graduation with a bachelor's degree from an accredited college or university that included not less than 30 semester hours or its equivalent in a basic or applied science.

§265.147. Continuing Education Requirements.

(a) Each registered sanitarian licensed by the department must meet the renewal requirements set out in this section.

(b) Each registered sanitarian must obtain and show proof of not less than 12 continuing education contact hours related to the fields of consumer health, environmental health or sanitation as defined in §256.142 of this title (relating to Definitions) within the 12 months preceding renewal of their registration.

(c) Only the following continuing education activities shall serve as a basis for registration renewal:

(1) approved by the department or its designee in accordance with this section; or

(2) approved by another professional regulatory agency in the State of Texas as acceptable continuing education for license renewal.

(d) Only continuing education activities provided by one of the following types of sponsors shall be approved by the department in accordance with these rules:

(1) a governmental agency;

(2) an accredited college or university;

(3) an association with a membership of 25 or more persons; or

(4) a commercial education business.

(e) Government agencies, non-profit organizations, and accredited colleges and universities are pre-approved as sponsors for continuing education when the activity is conducted or sponsored in compliance with these rules and is directly related to environmental health, consumer health, or sanitation.

(f) Continuing education activities conducted by approved sponsors must meet the following criteria:

(1) the activity must have significant educational or practical content to maintain appropriate levels of competency;

(2) the activity must have a record keeping procedure provided by the sponsor which includes a register of who took the course and the number of continuing education units earned;

(3) the sponsor must include procedures for verifying participant's attendance as well as comprehension of subject matter presented. These procedures may include, but are not limited to, examinations, post-activity questionnaires, field demonstrations, in-class workbooks or handout materials, and/or question and answer periods to assure participant understanding of the subject matter;

(4) the activity must be at least 50 minutes in length of actual instruction time. Round table discussions and more than one speaker for the total of 50 minutes per activity is permissible. No credit will be given for time used to promote the sponsor or other nonrelevant activities; and

(5) the sponsor must ensure the activity complies with all applicable federal and state laws, including the Americans with Disabilities Act (ADA) requirements for access to activities.

(g) Acceptable continuing education activities include the following:

(1) conferences;

(2) home-study training modules (including professional journals requiring successful completion of a test document);

(3) lectures;

(4) panel discussions;

(5) seminars;

(6) accredited college or university courses;

(7) video or film presentations with live instruction;

(8) field demonstrations;

(9) teleconferences;

(10) computer based training; or

(11) other activities approved by the department.

(h) Continuing education instructors must have one of the following credentials:

(1) certification as a registered sanitarian by the department;

(2) instructors at the Texas Engineering Extension Service;

(3) hold a faculty position at an accredited college or university;

(4) department personnel; or

(5) teaching or work experience determined by the sponsor to be sufficient.

(i) To obtain department approval to provide approved continuing education, the sponsor must submit:

(1) a completed application on department forms;

(2) the fee prescribed in §265.143(b)(9) of this title (relating to Fees); and

(3) any additional information or material requested by the department.

(j) The application and information must be submitted to the department at least 60 days in advance of the first date on which the sponsor plans to provide continuing education activities.

(k) The department shall approve, reject, or request additional information within 30 days of receipt of the application.

(l) Each approved continuing education sponsor shall be sanctioned for one year from date of approval. Sponsors who wish to continue approval should submit a sponsor approval form and fee as prescribed in §265.143(b)(9) of this title at least 30 days prior to the end of the one year period.

(m) Sponsors of approved continuing education activities shall:

(1) at the conclusion of the activity distribute to those registered sanitarians who have successfully completed the activity a certificate of completion which shall include the name of the sponsor, the date and name of the activity, and the continuing education units earned;

(2) maintain a copy of the register for two years and provide it to the department upon request.

(n) Each registered sanitarian shall collect and keep certificates of completion from all courses completed. These certificates of completion will be used to document a registered sanitarian's attendance at approved courses. Transcripts showing coursework in environmental or consumer health from an accredited college or university, or written verification of hours approved by the National Environmental Health Association (NEHA) will also be accepted. The department will conduct random audits for compliance with this requirement.

(o) The department may deny, revoke, or refuse to renew approval if the sponsor fails to maintain or provide records related to the provision of continuing education to the department, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(p) A registered sanitarian or sponsor may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 90 days, shall be granted by the department if the registered sanitarian or sponsor files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(q) Transition. Course sponsors who submitted one or more activities to the department and received approval between September 1, 2000, and September 1, 2002, will be approved for one year without payment of a fee upon completion and submission of the sponsor approval form within 90 days of the effective date of these rules.

§265.149. Application Approval or Disapproval.

(a) The department shall approve or disapprove all applications received for registration as a sanitarian and sanitarian-in-training.

(b) Notices of application approval, disapproval, or deficiency shall be in accordance with §265.156 of this title (relating to Processing Applications).

(c) An application for registration shall be disapproved if the person has:

(1) not met the requirements in §265.145 of this title (relating to Qualifications for Registration as a Sanitarian or Sanitarian-in-Training);

(2) failed to pass the examination prescribed by the department as set out in §265.148 of this title (relating to Examinations);

(3) failed to or refused to properly complete or submit any application form, documents, or fee or deliberately presented false information on any form or document required by the department;

(4) violated any provisions of the Occupations Code, Chapter 1953 or this subchapter;

(5) been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a registered sanitarian or sanitarian-in-training as set out in §265.154 of this title (relating to Registration of Persons with Criminal Backgrounds); or

(6) had a certificate or license to engage in a profession in this state or elsewhere revoked for unprofessional conduct, fraud, deceit, negligence, or misconduct in the practice of the profession; or

(7) satisfactory proof is presented to the board establishing that the person has been found guilty of unprofessional conduct, fraud, deceit, negligence, or misconduct in the practice of a profession.

(d) If after review, the department determines that the application should not be approved, the administrator shall give the applicant written notice of the reason for the decision and provide notice and an opportunity for a hearing in accordance with the provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, applicable state and federal statutes, the Rules of Practice and Procedures of the State Office of Administrative Hearings (SOAH) and this chapter.

§265.159. Exemption from Renewal and Continuing Education for Retired Professional Sanitarians.

(a) An individual who has been continuously registered for at least ten years as a professional sanitarian in Texas may use the titles "Retired Professional Sanitarian" and "R.S. (retired)" in accordance with the following conditions:

(1) the individual must have applied to the department and been approved for the exemption in accordance with subsection (c) of this section;

(2) the individual may not be employed in the field of environmental health, consumer health, or sanitation; and

(3) the individual may not represent him or herself to be currently registered as a sanitarian in Texas by the Texas Department of Health.

(b) Once an individual is approved for the exemption under this subsection, he or she must submit a new application for registration which meets the then current requirements for registration, including passing the examination, and receive a new, current registration card, prior to using the title "Professional Sanitarian" or "RS" again.

(c) An individual who wishes to request an exemption under this subsection must:

(1) submit a request form specified by the department;

(2) submit the required fee; and

(3) hold a current registration on the date the request is postmarked.

(d) An individual may not be approved for an exemption if an unresolved complaint under §265.155 of this title (relating to Violations, Complaints, Investigations and Disciplinary Actions is on file against him/her with the department.

(e) No renewal form, renewal fee or continuing education is required for individuals approved under this subsection.

(f) Transition. An individual who meets the following requirements is automatically approved under this subsection and may use the titles "Retired Professional Sanitarian" and "R.S. (retired)" without submission of a form or a fee to the department:

(1) meets the requirements of both subsection (a)(2) and (a)(3) of this section;

(2) was continuously registered for at least ten years as a professional sanitarian in Texas prior to September 1, 2000; and

(3) his or her registration lapsed prior to the effective date of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304920
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 28, 2003
Proposal publication date: April 18, 2003
For further information, please call: (512) 458-7236

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25 TAC §265.150

The repeal is adopted under the Occupations Code, Chapter 1953; and the Health and Safety Code, §12.001, which provides the Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of this rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 289. RADIATION CONTROL
SUBCHAPTER C. TEXAS REGULATIONS FOR CONTROL OF RADIATION

25 TAC §289.130

The Texas Department of Health (department) adopts an amendment to §289.130, concerning the Texas Radiation Advisory Board (board). This section is adopted without changes to the proposed text as published in the March 14, 2003, issue of the *Texas Register* (28 TexReg 2241) and will not be republished.

The board has provided advice to the Texas Board of Health, the department's radiation program, the Texas Commission on Environmental Quality, the Texas Railroad Commission, and other state entities in the area of state radiation policies and programs. The board is established under the Health and Safety Code, §11.016, which allows the Texas Board of Health to establish advisory committees and Health and Safety Code, §401.015, requiring the establishment of the board. The board is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §289.130 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review for §289.130 in the *Texas Register* on August 13, 2002 (27 TexReg 7997). No comments were received due to publication of this notice.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1997, the board established a rule relating to the Texas Radiation Advisory Board. The rule states that the board will automatically be abolished on September 1, 2003. The Texas Board of Health has now reviewed and evaluated the committee and has determined that the committee should continue in existence until September 1, 2007.

This section amends provisions relating to the operation of the board. Specifically, language is revised to: continue the board until September 1, 2007; specify that the board appoints its presiding officers; amend language regarding attendance; include additional requirements regarding statements by members; and clarify the components that the board must include in an annual report to the Texas Board of Health.

No public comments were received during the comment period for the rule.

The amendment is adopted under Health and Safety Code, §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the department, and the commissioner; and Government Code, §2110.005, which requires the department to adopt rules stating the purpose and tasks of its advisory committees. The review of this rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304890

Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 28, 2003
Proposal publication date: March 14, 2003
For further information, please call: (512) 458-7236

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CHAPTER 295. OCCUPATIONAL HEALTH
SUBCHAPTER C. TEXAS ASBESTOS HEALTH PROTECTION

25 TAC §295.73

The Texas Department of Health (department) adopts an amendment to §295.73, concerning the Asbestos Advisory Committee (committee). The section is adopted without changes to the proposed text as published in the May 23, 2003, issue of the *Texas Register* (28 TexReg 4050), and the section will not be republished.

The committee has provided advice to the Texas Board of Health (board) and the department in the area of asbestos licensing and compliance. The committee is established under the Health and Safety Code, §11.016, which allows the board to establish advisory committees. The committee is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §295.73 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review for §295.73 in the *Texas Register* on May 12, 2000 (25 TexReg 4360). No comments were received due to publication of this notice.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1998, the board established a rule relating to the Asbestos Advisory Committee. The rule states that the committee will automatically be abolished on September 1, 2003. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until September 1, 2007.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to: continue the committee until September 1, 2007; reduce the membership from twelve to nine; change the process for filling vacancies in the offices of presiding officer and assistant presiding officer; add additional time requirements for staff to furnish rules to committee members; clarify statements by members; and provide additional components that the committee must include in an annual report to the board.

No public comments were received during the comment period for the rule.

The amendment is adopted under Health and Safety Code, §11.016, which allows the board to establish advisory committees; §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner; and Government Code, §2110.005 which requires the department to adopt rules stating the purpose and tasks of its advisory committees. The review of this rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

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Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: May 23, 2003
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 411. STATE AUTHORITY RESPONSIBILITIES
SUBCHAPTER G. COMMUNITY MHMR CENTERS

25 TAC §411.309

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts amendment to §411.309, relating to appointment of manager or management team, of Chapter 411, Subchapter G, concerning community MHMR centers, with changes to the proposed text as published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5060). A notice of correction was published in the July 11, 2003, issue of the *Texas Register* (28 TexReg 5587), which corrected inaccuracies in the proposal preamble and a misspelling of the word "misused" in subsection (b) of the rule.

The amendments are pursuant to Senate Bill 464 of the 78th Texas Legislature, which amended the Texas Health and Safety Code, §534.038, with respect to the findings that the TDMHMR commissioner is required to make prior to appointing a manager or management team to operate a community center. The commissioner is no longer required to find that contract sanctions or interventions with a center's board of trustees have failed to bring the center into compliance with the center's plan or contract. The amendment reflects the stipulation in Senate Bill 464 that a center's appeal of an appointment of a manager or management team based on a finding of misuse of state or federal

funds would not stay the appointment. Previously the only appeal that would not stay the appointment was an appeal of an appointment based on a finding of endangerment or possible endangerment of the life, health, or safety of a person served by the center.

The only change made to the proposal upon adoption is the correction to the spelling of "misused" in subsection (b).

No comments on the proposed amendments were received.

Thie amendments are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Board of Mental Health and Mental Retardation (board) with broad rulemaking authority; and §534.038(d), which requires the board to adopt a rule prescribing a center's appeal of the commissioner's decision to appoint a manager or management team.

§411.309. Appointment of Manager or Management Team.

(a) The commissioner may appoint a manager or management team to manage and operate a community center in accordance with the Texas Health and Safety Code, §§534.038, 534.039, and 534.040.

(b) A community center may appeal the commissioner's decision to appoint a manager or management team in accordance with this subsection. The filing of a notice of appeal stays the appointment unless the commissioner based the appointment on a finding under §534.038(a)(2) or (4) of the Texas Health and Safety Code, (i.e., the commissioner finds that the community center or an officer or employee of the center misused state or federal money or endangers or may endanger the life, health, or safety of a person served by the center).

(1) The community center may appeal the appointment of a manager or management team by filing a notice of appeal requesting an administrative hearing "proposal for decision" in accordance with §§411.153 - 411.158 of Chapter 411, Subchapter D of this title (relating to Administrative Hearings of the Department in Contested Cases). The hearing is not a hearing of a contested case under the Administrative Procedures Act and is limited to issues related to the finding(s) under §534.038(a) of the Texas Health and Safety Code for which the manager or management team was appointed. After all evidence has been heard, the administrative law judge will close the hearing. Within 30 days from the date the hearing closed, the administrative law judge will submit a written proposal for decision to the commissioner.

(2) The commissioner will accept the administrative law judge's recommendation in the proposal for decision unless the commissioner finds that the recommendation is not supported by substantial evidence.

(3) The department will notify the community center of the commissioner's decision to uphold or reverse the original decision to appoint a manager or management team. If the decision is to uphold the original decision, then no other appeal process is available.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304830
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 1, 2003
Proposal publication date: July 4, 2003
For further information, please call: (512) 206-4516

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SUBCHAPTER I. TDMHMR IN-HOME AND FAMILY SUPPORT PROGRAM

25 TAC §411.405

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of §411.405 of Chapter 411, Subchapter I, concerning TDMHMR In-Home and Family Support Program, without changes as published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5061). New §411.405 of Chapter 411, Subchapter I, concerning the same, which replace the repealed section, is contemporaneously adopted in this issue of the *Texas Register*.

The repeal allows for the adoption of a new section governing the same matter.

No comments on the proposed repeal were received.

The repeal is adopted for repeal under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and §535.002(a), which requires TDMHMR to adopt rules, procedures, and standards to implement and administer Chapter 535 of the Texas Health and Safety Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304834
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 1, 2003
Proposal publication date: July 4, 2003
For further information, please call: (512) 206-4516

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25 TAC §411.405, §411.409

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §411.405 and amendments to §411.409 of Chapter 411, Subchapter I, concerning TDMHMR In-Home and Family Support Program, with changes to the proposed text as published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5061). The repeal of existing §411.405 of Chapter 411, Subchapter I, concerning the same, which the new section replaces, is contemporaneously adopted in this issue of the *Texas Register.*

The amended rules are in response to a significant reduction in appropriated funds for the TDMHMR In-Home and Family Support (IHFS) Program. Texas Health and Safety Code, §535.007(a) and (b), states that TDMHMR "*may* grant assistance of *not more than $3600* a year to a client" and "*may* award to a client a onetime grant of assistance of not more than $3600 for architectural renovations or other capital expenditure." Therefore, as permitted by state statute and to provide assistance to the greatest number of people with less funding, TDMHMR has reduced assistance to not more than $2500 a year and eliminated the onetime grant of assistance for architectural modifications or special equipment.

Section 411.405 is adopted with changes to add back all allowable costs that were proposed as deleted. Additionally, the proposed subsection describing the limitations on allowable costs has been changed to include only those limitations described in repealed §411.405. Section 411.409 is adopted with changes to add back the provision relating to disbursement of assistance for an emergency, which was proposed as deleted.

In response to public comments received on proposed new §411.403 and amendments to §§411.406, 411.407, and 411.411, TDMHMR has withdrawn these proposed rules.

Written comments on the proposal were received from Hill County Community MHMR Center, Kerrville; Tri-County MHMR Services, Conroe; West Texas Centers for MHMR, Big Spring; Heart of Texas Region MHMR Center, Waco; Mental Health Mental Retardation Authority of Harris County, Houston; Austin Travis County Mental Health and Mental Retardation Center, Austin; Sabine Valley Center, Longview; LifePath Systems, McKinney; Texas Center for Disability Studies, Austin; Texas Council for Developmental Disabilities, Austin; Advocacy, Incorporated, Austin; The Arc of Texas, Austin; a county judge, Bellville; four private citizens, New Caney, Seabrook, and Fort Worth; and a private citizen who was the original director of the TDMHMR In-Home and Family Support Program, Austin.

One commenter, who was the original director of the TDMHMR IHFS Program, provided the following comment: "I was saddened and somewhat sickened by what the Legislature did in slashing the program to garner the general revenue, but I have been appalled by what the Department has done in these proposed rules to undermine the philosophy and beauracratize a program that was once considered to be 'best practice' and 'cutting edge' due to its flexibility to meet varying needs and its ability to be customer-friendly. It is my sincere desire that the Department seriously reconsiders what has been proposed and adopts a position of continuing to administer a 'best practice' program with fewer funds. It began with much less funding than is now available and was still able to reflect a philosophy of flexibility in supports and a partnership with consumers in determining needs and supports."

A second commenter noted that two decades ago her organization, The Arc of Texas, envisioned and lobbied for a program that would provide financial grants to families and individuals with mental retardation who live independently or at home with loved ones. The Arc of Texas' legislative efforts focused on the development of a program that would ensure consumer-directed supports, flexibility, and easy access. The Arc of Texas celebrated the creation of the IHFS Program because it was accessible, flexible, cost-effective, and focused on meeting the unique needs of every individual. The commenter expressed extreme disappointment in the proposed rules because they "are so far removed from the statutory intent of consumer directed supports and easy access, that it no longer fulfills the original intent of The Arc of Texas' legislative efforts."

Three commenters stated, "While we understand that the 78th Legislature has put severe limitations on the funding for this program, we do not believe that reduced funding necessitates elimination of the principles of flexibility, self-determination, and community inclusion." Another commenter stated that the proposed rules will significantly impact families who care for adults or children in their own homes. The commenter also stated, "It is distressing that the amount of the grant is proposed to be reduced (and eliminated for mental health) coupled with limitations on critical services and supports. Reducing the level of service to families and eliminating emergency access will increase the risk of institutionalization for individuals who would otherwise remain in their community. Self-direction, choice, flexibility and community integration will be sacrificed if this new rule is adopted."

One commenter expressed disagreement with all of the proposed changes. The commenter stated that, although fewer people will receive program assistance because there are fewer dollars available, there is no need to compromise the integrity of the services or the intent of the original legislation. Another commenter, a county judge, asked TDMHMR to consider the long-term harm that will be done if these proposed changes are adopted. The commenter stated, "I cannot even begin to count the families who are maximizing every possible resource and saving long-term spending by the state."

One commenter stated, "We cannot overemphasize the need to maintain the key elements of this program--flexibility, choice and self-determination. This program has proved over and over that a relatively small number of dollars can make a huge impact for persons with disabilities and their families when they are used to meet that specific family's needs and priorities. We strongly encourage a full array of allowable services with maximum access and flexibility."

TDMHMR responds to the commenters' concerns by adding language to §411.405 that restores all previously eliminated allowable costs and deleting language regarding all proposed limitations on allowable costs.

One commenter, whose family is a current recipient of the IHFS Program, stated that her family is in a middle-income tax bracket and has relatively good insurance, but the family must pay for several items related to a child's disability that are not covered by insurance. The commenter noted that the IHFS Program has funded several types of equipment that was recommended by her child's doctor or therapist and that the program is her only source of funding for diapers (a huge expense). The commenter was extremely thankful for the program because it is one of the few that helps middle-income families. TDMHMR appreciates the commenter sharing her experience and notes that the commenter's experience with the program indicates the program is being implemented as intended.

Two commenters stated that they had no objections to the proposed changes associated with allowable and unallowable costs as well as the reduction in the maximum amount of assistance. The commenters, however, expressed concern that the rules do not provide administering agencies with adequate guidance for determining how to disburse the limited funds among the large numbers of current recipients. One commenter stated that the section related to disbursing assistance (§411.409) "provides much of the same language as in the past but does not recognize that a major drop in funding will inevitably require tough decisions on discontinuing assistance for many recipients who have a continuing need. With the follow-up evaluation process, it is likely that many needs will remain and there will be inadequate funds to continue addressing them." The commenters asked a number of questions, including whether assistance should continue on a first response basis when follow-up evaluations begins or whether the administering agency should go back to the original application to determine who was first to apply. The commenter also asked if there were certain categories of allowable costs that should be viewed as a higher priority than others. Both commenters requested guidance on how to decide which recipients

will continue to receive assistance and which recipients will not, with one commenter noting that "it would only seem right that we do it the same way across the state." TDMHMR acknowledges that the significant reduction in appropriated funds will force administrating agencies to make tough decisions, but notes that administering agencies are familiar with recipients' needs and the resources available in their communities and, therefore, are the most appropriate entities to determine whether recipients' assistance should continue. TDMHMR notes that the follow-up evaluation process in §411.409(d) provides guidance in continuing assistance *within available funds*. Regarding whether there are certain categories of allowable costs that should be viewed as a higher priority than others, TDMHMR responds that the rule does not prioritize allowable costs.

One commenter conveyed no opposition to the proposal, but expressed concern that a memo from the TDMHMR commissioner dated July 1, 2003, was contradictory to the proposed rule changes. The commenter stated that "the memo states that there will be no need for administrative structure for the program, the formal application process is eliminated, the need for services will be included in the individual's GR plan of care and that although our 'benchmarks' for spending are being eliminated, we should still have some way of tracking the expenditure of funds under each plan." The commenter noted that the memo made no mention of the rules' requirements for follow-up evaluations and developing a written plan that addresses specific elements for accountability. The commenter strongly suggested that the rule more appropriately reflect how administering agencies are expected to implement the program. TDMHMR agrees and will issue a clarification to the July 1, 2003 memo. TDMHMR notes that, because the program's appropriated funds have been significantly reduced, the memo directed the administering agency to incorporate costs for the program's administrative functions into the agency's overall administrative costs, which are paid with the agency's 10% administrative allowance provided under its performance contract with TDMHMR. Additionally, while administering agencies are encouraged to streamline its formal application process, TDMHMR will clarify that some sort of application process must be in place. TDMHMR will also remind administering agencies that the rules require a detailed written plan for every recipient and, for those individuals who receive both general revenue-funded services and IHFS assistance, the administering agencies should incorporate the IHFS written plan in the individuals' plans of care for general revenue-funded services.

Five commenters objected to vitamin/nutritional supplements being considered an unallowable cost. One commenter noted that her daughter, who has Down's syndrome, has flourished since taking specially formulated vitamin/nutritional supplements. The commenter related there is much research showing that children with Down's syndrome are literally starving to death, on a cellular level, because they do not metabolize their nutrients in the same way as normal children. The commenter noted that the research is not junk science and has been featured on the television program "60 Minutes." Another commenter stated the IHFS Program is one of the few programs that supports families and individuals in the purchase of needed nutritional supplements, pointing out that §411.404(d) states that the program is a program of last resort. Two other commenters stated that for children with disabilities, nutritional supplements can often be the key to maintaining their health, but that these supplements can be costly and out-of-reach for many families. TDMHMR responds to the commenters' concerns by adding language to §411.405 which restores all previously eliminated allowable costs and by not adopting proposed §411.403, which would modify the definition of "over-the-counter medication" to include a vitamin, mineral, or herbal supplement, which is an unallowable cost.

Regarding §411.405(a), seven commenters adamantly opposed the elimination of multiple services and supports as allowable costs, noting that a full array of services and supports is the cornerstone of the program. Two commenters noted that §411.404(a)(1) describes the criteria for purchasing items with assistance (i.e., that the item support the person to live in his/her home, integrate the person into the community, and promote self-sufficiency) and stated that "the proposed changes remove or limit primary services designed" to meet this very criteria! Additionally, the commenters stated, "Reducing the amount of stipend available does not make it necessary to remove the flexibility that has helped to prevent institutionalization of both children and adults." One commenter stated that TDMHMR should continue to allow the full range of services and supports and leave it up to persons and families to determine what mix of services and supports best meets their needs within the $2500 limit. Another commenter noted that "given the state's budget crisis and the magnitude of budget cuts this population must endure, it does not make any sense that the Department eliminate or limit allowable costs... Now, more than ever, individuals and families need program flexibility."

Four commenters specifically objected to community inclusion services being eliminated as an allowable cost. One of the commenters noted that community inclusion services represent the heart of the IHFS program philosophy. The commenter stated that "the limitations target children by preventing after-school care, summer activities, and specialized child care under age 13. With the legislative actions balancing the budget on the backs of children and families, it does not make sense for TDMHMR to eliminate services that are traditionally used to support children." Another commenter stated that eliminating most community inclusion services sets persons with mental retardation back two decades.

Three commenters also objected to major vehicle repair being eliminated as an allowable cost. One of the commenters stated that the family automobile may be the only means to get a child to the doctor, therapy, and other necessary appointments. Another commenter, who also objected to short-term vehicle rental being eliminated as an allowable cost, stated "many parts of Texas do not have public transportation or people to provide transportation for reimbursement. The inclusion of vehicle rental and repair addresses the needs of rural Texas." The commenter noted that "[Texas Health and Safety Code] Chapter 535 does not limit 'transportation, room and board for evaluation and treatment' to 'out-of-town.' Vehicle rental or repair could facilitate transportation to evaluation and treatment in town."

One commenter objected to housing-related expenses being eliminated as an allowable cost. The commenter stated that the purpose of this service is to provide for expenses related to individuals transitioning from institutions into the community and, historically, has been used as the last resort to facilitate transition. The commenter noted that elimination of housing-related services may result in increased costs due to longer stays in institutions. Another commenter objected to vendor fiscal intermediary fees being eliminated as an allowable cost.

TDMHMR responds to the commenters' concerns by adding language to §411.405 which restores all previously eliminated allowable costs and by deleting all proposed language regarding limitations on allowable costs.

One commenter asked if TDMHMR intends to eliminate the "other" category as an allowable cost in §411.405(a)(8). TDMHMR responds that the "other" category was not eliminated in the proposed rules.

Seven commenters objected to the proposed limitations in §411.405(b). One of the commenters noted that the amount of services described in the written plan would no longer be based on need, but driven by an arbitrary limit (e.g. six hours of specialized child care does not allow for working parents). Two of the commenters stated that the limitations are not necessary because the annual $2500 cap is self-limiting and "the amount of each service should not be limited by arbitrary restrictions (caps) that policymakers have determined to be adequate." Five of the commenters noted that the appropriate services and the appropriate level of those services are best determined on an individual basis within the maximum per person limit. Three commenters stated that proposed limitations would drastically increase the administrative cost of implementing the program because a tracking system must be developed to ensure limitations are not exceeded. TDMHMR responds to the commenters' concerns by deleting all proposed language regarding limitations on allowable costs.

Regarding §411.405(b)(8), two commenters objected to the limitations for specialized child care for a person age 13 years or older. One of the commenters stated that the limitation of no more than six hours per week would cause serious hardships for families of these children and noted that child care facilities do not provide care to children over 12 years of age. Another commenter stated that caring for an adult child with mental retardation prevents some parents from working or even having a hobby. Both commenters recommended that the limitation be raised to at least 10 hours per week. Additionally, one of the commenter disagreed with the elimination of specialized child care for a child under the age of 13 years as an allowable cost. The commenter noted there are few child care facilities, especially in rural areas, that are capable of caring for children with disabilities. The commenter stated that "not allowing families to hire a person one-on-one for their child, hinders their ability to work" and to finance the needs of their families. TDMHMR responds to the commenter's concerns by adding language to §411.405 which restores all previously eliminated allowable costs and by deleting all proposed language regarding limitations on allowable costs.

Regarding the limitations for respite care in §411.405(b)(10), one commenter stated that, with the elimination of community inclusion services, respite is even more necessary for families. The commenter noted that families should be allowed more respite than part of one day per month (i.e., 10 hours per month). The commenter stated that an occasional weekend is all that some families need to continue caring for an individual with mental retardation the other 28-29 days a month. Another commenter, noting that the limitation would preclude 24-hour respite, stated that "while I was single, I'm not sure how I would have managed [without 24-hour respite] the two or three times a year I'm forced to be away from home overnight on business." The commenter also stated that some parents will be forced to reconsider group home placement because of the limitations on respite. A third commenter asked if the rule could be made more flexible, such as 120 hours per year, one week per year, or one weekend per several months. A fourth commenter noted that her agency's board of trustees and Mental Retardation Planning Advisory Committee identified respite as the number one priority for persons with mental disabilities being served in Harris County and stated that the reduction will impact the majority of consumers who pay for respite services with IHFS program assistance. A fifth commenter stated that the limit should be less than the proposed 10 hours per week. The commenter noted that the purpose of respite is to provide temporary relief for the caregiver and suggested 20 hours per month, one weekend per month, or two weeks per year. TDMHMR responds that it has deleted all proposed language regarding limitations on respite.

Regarding the mental illness diagnosis requirement for eligibility determination in §411.407(a)(1)(A)(i), one commenter requested that the definition of "mental illness" match the definition of "mental illness" that is used in the TDMHMR contract with community centers (i.e., priority population). TDMHMR responds that §411.403 contains a definition of "mental illness" that is consistent with the definition required by the program's enabling legislation (see Texas Health and Safety Code, §535.001(5)). TDMHMR notes that eligibility for IHFS Program assistance is not limited to members of the priority population.

Regarding §411.407 and §411.409, five commenters objected to the elimination of assistance in an emergency and stated that such action is short-sighted and will likely result in increased costs to the state. One of the commenters noted that "the original purpose of including an 'emergency' option for entering the program was due to the bottleneck that was created by the eligibility process. It allowed persons in crisis to have immediate access to the program to prevent out-of-home placement while the eligibility determination was in process." All five commenters expressed grave concerns that the elimination of this option will force families most in need to seek out-of-home placement, which is costly, causes significant emotional trauma to the family, and strips away the right of individuals with disabilities to live in their communities. Another commenter stated that the elimination of funding for emergencies will have a limited impact at her agency because "the majority of consumers who utilized this option were mental health consumers and this funding option was eliminated for fiscal years 2004 and 2005." TDMHMR responds to the commenters' concerns by adding language to §411.409 which restores the provision for disbursement of assistance for an emergency; by not adopting proposed §411.407, which would not allow for the granting of eligibility for a person or family in an emergency; and by not adopting proposed §411.403, which would delete the definition of "emergency."

Regarding the reduction of the maximum amount of annual assistance from $3600 to $2500 in §411.409(b)(1), one commenter stated it is evident TDMHMR decided to reduce the amount in order to serve more consumers, but that the reduction will affect those most in need of support. The commenter noted that the phrase "may grant assistance of not more than $3600 a year to a client," quoted by TDMHMR from the Texas Health and Safety Code, §535.007(a), as its authority to reduce the maximum has always referred to the assistance being flexible and based on individual needs, not as a way to limit the program. The commenter also noted that another section of Chapter 535 states that the department by rule "may add services and programs for which the department may provide assistance."

Another commenter expressed appreciation of TDMHMR's efforts to maximize the number of individuals served by the program, but stated The Arc of Texas cannot support TDMHMR's proposal to reduce annul assistance to not more than $2500. A third commenter stated that TDMHMR "does not need to reduce the individual amount from $3600 to $2500." The commenter also stated "It is pretty well known that most individuals do not

use the fully allocated amount of $3600 per person per year, and local authorities are judicious about their allocations." A fourth commenter stated: "Over the years there had been no cost of living adjustments to the $3,600 maximum per year, which simply didn't afford the same level of care in 2003 as it did in 1988. Unfortunately, even the $3,600 has now been whittled down to $2,500. I suppose we can hope that consumers have fewer and fewer needs." A fifth commenter stated, "Families have been remarkably capable of identifying their most critical needs and requesting only items that truly meet those needs. Indeed, the average grant amount for our center is $1850. However, families with greater need or experiencing crisis must be able to access supportive funds, particularly since this is a program of last resort. We do not support the reduction of the maximum grant to $2500."

TDMHMR responds that, although it has reduced the maximum amount of assistance per recipient per year, it has not reduced a recipient's flexibility to choose the types of services and supports that best meet his/her needs. TDMHMR does not interpret the reduction as a way to limit the program, but rather as a way to provide assistance to the greatest number of people. TDMHMR notes its program data indicates the overall reduction in appropriated program funds will have a greater negative impact on eligible persons and families than reducing the per-year maximum. Regarding persons and families in need of more than $2500 in assistance, TDMHMR notes that §411.409(b)(2) allows for the TDMHMR commissioner or designee to grant assistance in excess of $2500 on a case-by-case basis.

Regarding §411.409(b), two commenter stated that their organizations were disappointed in the removal of the one-time assistance for special equipment or architectural modifications, but were pleased that annual assistance could be used for those services. The commenters also expressed support for the provision that allows the TDMHMR commissioner, on a case-by-case basis, to grant assistance in excess of the stipulated $2500 annual limit. TDMHMR responds that it appreciates the commenter's support.

One commenter adamantly opposed eliminating the one-time assistance for special equipment or architectural modifications. The commenter stated that "the purpose of this one-time grant is to purchase architectural modifications to one's home, special equipment and/or supported living services (dental treatment) to enhance client/customer independence in the community." TDMHMR responds that in order to provide assistance to the greatest number of people with less funding TDMHMR has chosen to eliminate the one-time grant for special equipment or architectural modifications, which is in addition to the assistance of up to $2500 per fiscal year under §411.409(b)(1). TDMHMR notes that the elimination of the one-time grant does not prohibit an eligible person or family from purchasing special equipment or architectural modifications with assistance under §411.409(b)(1).

One commenter stated that §411.410(c) permits administering agencies to use program funds to pay for indirect costs of the program within the percentage allowed by TDMHMR, but noted that a memo from the commissioner dated July 1, 2003, stated "the administrative allowance for this program has been eliminated." The commenter asked why TDMHMR has essentially set the percentage at 0%. Another commenter stated that TDMHMR has eliminated all administrative allowance for the program, yet increased the administrative burden by imposing limitations that must be managed.

A third commenter noted that the elimination of the administrative cost should be reviewed. The commenter stated, "Even though the program will be incorporated into the General Revenue (GR) Service Coordination component, the IHFS program not only serves consumers receiving GR services, but often those consumers receiving no GR services from any program within the agency. The program also requires the oversight of caseworkers, reports, complaints, appeals, and budget that create a need for having an administrative cost which would now need to be absorbed by the agency."

A fourth commenter stated, "The expressed intent of the Department has been that these funds be administered through service coordination. That does not address how the program will be administered to people who are not admitted to services and do not have a service coordinator. These are often people who need the program most since they are on the waiting list and not currently receiving services." The commenter noted that "administrative requirements still in the rule, such as awarding funds on chronological order (§411.408(b)), approving written plans (§411.409(a)(2)), follow-up evaluation (§411.409(d)), tracking expenditures in CARE as required by the performance contract, will all require some type of centralized administrative oversight of the program, all of which comes at a cost." The commenter recommended that the "IHFS funds be subject to the same 10% management and support cost as general revenue funds."

TDMHMR responds that it will issue a clarification to the July 1, 2003, memo. TDMHMR notes that, because the program's appropriated funds have been significantly reduced, the memo directed the administering agency to incorporate costs for the program's administrative functions into the agency's overall administrative costs, which are paid with the agency's 10% administrative allowance provided under its performance contract with TDMHMR. Additionally, the memo should not be interpreted to mean it is TDMHMR's intent that the IHFS program be administered through service coordination. The memo's intent was to allow administrating agencies flexibility in administering the program, including, for those individuals who are receiving both general revenue-funded services and IHFS assistance, having their service coordinators perform some of the program's administrative tasks, such as determining eligibility, conducting the follow-up evaluation, and developing the written plan.

One commenter stated that the subchapter should address how long a recipient can continue to receive assistance. The commenter noted that "funding constraints in the IHFS program and the increasing waiting list warrants that a limit on the number of years receiving services be considered." The commenter also noted that "the IHFS program is intended to be an empowerment program of last resort for consumers with the expectation that families eventually seek other resources to provide the services they receive through the program." TDMHMR responds it agrees with the commenter that participation in the IHFS program should be short-term and that recipients are expected to organize and plan for long-term solutions. Further, administering agencies are expected to assist persons and families with this process. However, TDMHMR understands that long-term solutions are not always available and those that are available can have very long waiting lists.

The amendments and new section are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and §535.002(a), which requires TDMHMR to

adopt rules, procedures, and standards to implement and administer Chapter 535 of the Texas Health and Safety Code.

§411.405. Allowable Costs.

(a) Assistance may be used to pay for any item described in this section if the item meets the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations).

(1) Special equipment as follows:

(A) therapy equipment, as recommended by a physical or occupational therapist following evaluation;

(B) motorized or hand-powered lift;

(C) mobility equipment, as recommended by a physician, or physical or occupational therapist following evaluation;

(D) medical equipment, as prescribed by a physician; and

(E) assistive technology (as defined), as recommended by a physical, occupational, or speech therapist following evaluation.

(2) Architectural modifications to the person's natural home as follows:

(A) ramp, porch, or sidewalk;

(B) handrail;

(C) room construction, with the limitations described in subsection (b)(1) of this section; and

(D) house renovation.

(3) Health services as follows:

(A) therapy, as recommended by a physician, or physical, occupational, or speech therapist following evaluation;

(B) diagnostic service;

(C) medication, as prescribed by a physician, with the limitations described in subsection (b)(2) of this section;

(D) surgery, as recommended by a physician, or oral surgery, as recommended by a dentist;

(E) laboratory service, as prescribed by a physician;

(F) dental, as recommended by a dentist;

(G) non-durable or disposable supply;

(H) adaptive aid (as defined), as recommended by a physical or occupational therapist following evaluation; and

(I) specialized nutritional product, as prescribed by a physician, with the limitations described in subsection (b)(3) of this section.

(4) Counseling and training services as follows:

(A) counseling;

(B) behavior therapy;

(C) behavioral coach service provided under the supervision of a behavior therapist;

(D) independent or daily living training;

(E) family or caregiver training;

(F) job coach services; and

(G) remedial education for an adult.

(5) Home care services as follows:

(A) home health aide service, as prescribed by a physician;

(B) homemaker service; and

(C) personal assistant service;

(D) attendant support for participation in after-school activities for:

(i) a person 17 years of age or under; or

(ii) a person age 18, 19, 20, 21, or 22 years who is enrolled and attends public school;

(E) attendant support for participation in summer activities for:

(i) a person 17 years of age or under; or

(ii) a person age 18, 19, 20, or 21 years who is enrolled to attend public school in the fall semester following that summer;

(F) specialized child care for a person age 13 years or older; and

(G) specialized child care for a person under age 13 years, with limitations described in subsection (b)(4) of this section.

(6) Transportation as follows:

(A) out-of-town transportation, room, and board for evaluation and treatment;

(B) public transportation;

(C) mileage reimbursement, with limitations described in subsection (b)(5) of this section;

(D) short-term vehicle rental; and

(E) major vehicle repair, with limitations described in subsection (b)(6) of this section.

(7) Respite care as follows:

(A) in-home respite; and

(B) out-of-home respite.

(8) Other items as agreed upon by the person or family and administering agency that meet the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations), including:

(A) housing-related expenses, with limitations described in subsection (b)(7) of this section, as follows:

(i) housing start-up, which is rent and rent deposit, utilities and utilities deposit, and minimal furniture and appliances; and

(ii) housing; and

(B) vendor fiscal intermediary fees that are related to an eligible person or family being an employer of a service provider who is paid with assistance, as determined in accordance with §411.408(d) of this title (relating to Applying for Assistance and Processing Applications).

(b) Limitations are placed on the following costs listed in subsection (a) of this section.

(1) Allowable costs for room construction are limited to situations in which:

(A) house renovation is not feasible; and

(B) the room constructed will be used primarily by the person on a daily basis.

(2) Psychoactive medications are limited to no more than a two-month supply per fiscal year.

(3) Allowable costs for a specialized nutritional product (as defined) are limited to those costs in excess of routine food and nutritional costs.

(4) Allowable costs for specialized child care for a child under the age of 13 years are limited to those costs in excess of the prevailing rate for routine child care.

(5) Mileage reimbursement may not exceed the state-reimbursed mileage rate.

(6) Limitations on major vehicle repair.

(A) Allowable costs for major vehicle repair are limited to costs necessary:

(i) for the vehicle to be legally operational; and

(ii) to repair the vehicle's air conditioning if the vehicle is the person's primary mode of transportation and a physician determines that the person requires air conditioning while traveling in the vehicle.

(B) Major vehicle repair does not include routine vehicle maintenance.

(7) Housing-related expenses are limited to no more than two months per fiscal year.

§411.409. Written Plan and Disbursing Assistance.

(a) Written plan. When TDMHMR In-Home and Family Support Program funds are available, the administering agency staff must ensure a written plan is developed and approved in accordance with this subsection. A written plan is current only for the fiscal year for which it is developed.

(1) The administering agency staff must meet with the person or family to develop a written plan. The written plan must include:

(A) the name of the person;

(B) the name of the administering agency staff who developed the written plan;

(C) a description of:

(i) the person's or family's need, as determined by the need factor;

(ii) each item listed as an allowable cost in §411.405 of this title (relating to Allowable Costs) that has been identified to meet that need;

(iii) how each item meets the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations); and

(iv) the goal(s) and desired outcome(s);

(v) how each item will assist in achieving the goal(s) and outcome(s); and

(vi) how each item will positively impact the mental disability or co-occurring physical disability;

(D) a specific description of:

(i) each item to be paid for with assistance (e.g., equipment model number, type of training or counseling), including method of delivery;

(ii) the quantity, frequency, and duration of each item;

(iii) the cost or rate of each item; and

(iv) the amount and frequency of payment, and designation of payee (i.e., recipient or administering agency);

(E) other support programs that are appropriate for the person or family and that the person or family has contacted, and the outcome of that contact (e.g., ineligible, denied, waiting list) as required in §411.407(a)(4)(C) of this title (relating to Eligibility Determination);

(F) a description of the required provider or vendor qualifications for each item to be paid with assistance and a statement by the person or family and administering agency staff that the selected provider or vendor meets the required qualifications or, if assistance will pay for architectural modifications, a description of the project's specifications and the required contractor qualifications or required qualifications for the individual who will perform the work and a statement by the person or family and administering agency staff that the selected contractor or individual meets the required qualifications;

(G) the co-payment percentage and amount of co-payment;

(H) a statement by the person or family that the person or family agrees to submit a receipt for each item purchased with assistance within 30 days after purchase and that the receipt will, at a minimum:

(i) state the cost of the item and the co-payment amount;

(ii) include the date or dates the item was provided, purchased, or delivered;

(iii) include the name and address of the provider or vendor or, for architectural modifications, the name and address of the contractor or the individual performing the work; and

(iv) be marked as paid;

(I) a statement by the person or family that the person or family agrees to comply with the written plan and that the person or family understands noncompliance with the written plan may result in:

(i) immediate termination of assistance;

(ii) liability for restitution of assistance received; and

(iii) ineligibility for assistance;

(J) a description of how the administering agency will monitor the person's or family's compliance with the written plan, including:

(i) identifying the administering agency staff responsible for monitoring;

(ii) identifying documentation requirements for the person or family, such as maintaining a detailed provider log, obtaining and submitting receipts;

(iii) identifying monitoring activities, such as conducting home visits or face-to-face visits with the person or family, ensuring receipts are submitted and documented in accordance with subparagraph (H) of this paragraph, ensuring accurate completion of

provider logs, reviewing receipts to ensure assistance is used to purchase approved items within 90 after disbursement of assistance; and

(iv) identifying the frequency of monitoring activities;

(K) a statement by the persons or family that the person or family understands the person or family:

(i) may not use assistance to purchase any item that has not been approved in the written plan;

(ii) must return any unused assistance to the administering agency by the earliest of the following dates:

(I) within 30 days after purchasing the item(s);

(II) within 30 days after the person or family or administering agency determines that assistance for the item is no longer needed; or

(III) within 30 days after the end of the fiscal year; and

(iii) may not use a provider or vendor who has not been approved in the written plan, or for architectural modifications, a contractor or individual to perform the work who has not been approved in the written plan;

(L) a statement by the person or family that, if the person or family is a child support obligor, the person or family is not more than 30 days delinquent in paying child support or is in compliance with a written repayment agreement or court order as to any existing delinquency;

(M) a statement by the person or family that the person or family understands the person or family is responsible for resolving any disputes with a provider, vendor, contractor, or individual who is paid with assistance;

(N) a statement by the person or family that the person or family understands it is a felony of the third degree to make or cause to be made a statement or representation the person or family knows to be false or to solicit or accept assistance for which the person or family knows the person or family is not eligible; and

(O) the signatures of the administering agency staff and the person or family who developed the written plan and the date it was signed.

(2) The administering agency must designate a staff member who is responsible for approving written plans. Within 10 days after receipt of a written plan, the staff member must approve the written plan, disapprove the written plan, or approve the written plan with changes.

(A) If the staff member disapproves the written plan, then the staff member must provide written information regarding the reasons for disapproval and the requirements for re-submission.

(B) If the staff member approves the written plan with changes, then the staff member must provide written information regarding the necessary changes.

(3) The administering agency must provide the person or family with a copy of the approved written plan.

(b) Disbursement of assistance. Following approval of the written plan, the administering agency will disburse assistance in accordance with the written plan and this subsection. The amount of assistance disbursed to the recipient does not include the amount of the person's or family's co-payment.

(1) Assistance of up to $2500 per fiscal year will be provided to the person or family or to the provider, vendor, contractor, or individual performing work on behalf of the person or family and disbursed in a lump sum or on a periodic basis. Assistance provided under this paragraph may not be encumbered from one fiscal year to the next.

(A) Special equipment purchased with assistance is the property of the recipient and may not be inventoried by the administering agency or TDMHMR.

(B) Architectural modifications purchased with assistance belong to the property owner, and may not inventoried by the administering agency or TDMHMR.

(2) On a case-by-case basis, the TDMHMR commissioner or designee may grant assistance in excess of that described in paragraph (1) of this subsection.

(c) Disbursement of assistance for an emergency. Assistance may be disbursed for an emergency to an eligible person or family on record as waiting for assistance. Assistance disbursed for an emergency under this subsection may be for no more than 60 days and is limited to the extent necessary to resolve the emergency. A written plan must be developed in accordance with subsection (a) of this section and will address only those issues and items necessary to resolve the emergency. The person or family will remain on record as waiting for assistance if the person or family continues to be eligible for assistance after the emergency is resolved.

(d) Change in a recipient's eligibility factor. A recipient must notify the administering agency within 10 calendar days after a change in any eligibility factor (i.e., diagnosis, residency, financial, or need), as described in §411.407(a) of this title (relating to Eligibility Determination) has occurred. When notified of a change in an eligibility factor, the administering agency must determine if the recipient continues to be eligible for assistance in accordance with §411.407 of this title (relating to Eligibility Determination) within 30 days after notification. If the administering agency determines that the recipient is no longer eligible for assistance, then the administering agency must immediately terminate assistance. A recipient whose assistance has been terminated in accordance with this subsection is entitled to appeal the determination of ineligibility in accordance with §411.411 of this title (relating to Appeal).

(e) Follow-up evaluation.

(1) Following completion of assistance within the fiscal year. No later than 30 days after completion of assistance within the fiscal year in which it was disbursed, the administering agency staff will provide written notification to the recipient stating that the recipient is responsible for contacting the administering agency within 30 days after receipt of the notification to arrange for a follow-up evaluation. If the follow-up evaluation indicates:

(A) the stated goal(s) and outcome(s) have been achieved, then assistance will cease and the person or family will exit the program; or

(B) the stated goal(s) and outcome(s) have not been achieved or an additional need has been identified, then staff will determine if the person or family meets the requirements of the need factor in accordance with §411.407(a)(4) of this title (relating to Eligibility Determination) and, if funds are available, amend the written plan.

(2) End of the fiscal year. No later than 90 days prior to the end of the fiscal year, the administering agency staff will provide written notification to the recipient stating that the recipient is responsible for contacting the administering agency within 30 days after receipt of

the notification to arrange for a follow-up evaluation. If the follow-up evaluation indicates:

(A) the stated goal(s) and outcome(s) have been achieved, then assistance will cease and the person or family will exit the program; or

(B) the stated goal(s) and outcome(s) have not been achieved or an additional need has been identified, then staff will re-determine if the person or family is eligible for assistance in accordance with §411.407(a) of this title (relating to Eligibility Determination) and, if funds are available, develop a new written plan in accordance with subsection (a) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: September 1, 2003
Proposal publication date: July 4, 2003
For further information, please call: (512) 206-4516

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CHAPTER 414. PROTECTION OF CONSUMERS AND CONSUMER RIGHTS SUBCHAPTER K. CRIMINAL HISTORY AND REGISTRY CLEARANCES

25 TAC §414.504

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts amendment to §414.504, relating to pre-employment and pre-assignment clearance, of Chapter 414, Subchapter K, governing criminal history and registry clearances, without changes to the proposed text as published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5085).

The amendments are pursuant to House Bill 1971 of the 78th Texas Legislature, which amended the Texas Health and Safety Code, §250.006(b), with respect to the offenses that serve as bars to employment in positions involving direct contact with consumers in facilities that serve people who are elderly or people who have disabilities. The bar to employment for five years following the date of conviction, which was previously applicable to felony theft only, has been extended through legislation to also apply to assault, burglary, the misapplication of fiduciary property or property of a financial institution, and securing execution of a document by deception.

Public comment on the proposal was received from Mental Health Mental Retardation Authority of Harris County in Houston. The commenter suggested including in the list of offenses in §414.504(g), instances of confirmed Class I abuse and neglect as reflected in the Client Abuse and Neglect Reporting System (CANRS). TDMHMR declines to add a confirmed Class I abuse and neglect because confirmed Class I abuse is not a *criminal* offense. The offenses listed in §414.504(g) originate in the Texas Health and Safety Code, §250.006, and are determined *by law* to constitute an absolute bar to employment. TDMHMR notes, however, that agency policy prohibits facilities and local mental health and mental retardation authorities from employing any person who has been confirmed of Class I abuse as reflected in CANRS.

This amendments are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Board of Mental Health and Mental Retardation (board) with broad rulemaking authority; and §534.052, which requires the board to adopt rules it considers necessary and appropriate to ensure the adequate provision of community-based mental health and mental retardation services through a local mental health or mental retardation authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4516

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CHAPTER 419. MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM

25 TAC §§419.153, 419.155, 419.159, 419.166

The Texas Department of Mental Health and Mental Retardation (department) adopts amendments to §§419.153, concerning definitions; 419.155, concerning eligibility criteria; and §419.159, concerning level of care (LOC) determination, with changes to the text as proposed in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4827). Amendments to §419.166, concerning revisions and renewals of individual plans of care (IPCs), levels of care (LOCs) and levels of need (LONs) for enrolled individuals are adopted without changes.

The amendments to rules governing the Home and Community-based Services (HCS) Program, a department-operated Medicaid waiver program under §1915(c) of the Social Security Act, are responsive to new Texas Health and Safety Code (THSC), §533.0355, added by House Bill 2292 (HB 2292), §2.76, 78th Legislature, 2003. New §533.0355 redefines the responsibilities of mental retardation authorities (MRAs), program providers, and the department under the Mental Retardation Local Authority (MRLA) Program, another department-operated Medicaid waiver program. The redefined responsibilities describe a program model that more closely resembles that of the HCS Program than the MRLA Program. The department determined that the most efficacious manner to implement the redefined waiver program responsibilities required by §533.0355 is to provide all waiver services and supports through the HCS Program. Therefore, coinciding with the September 1, 2003, effective date of the relevant provisions of HB 2292, the department will no longer operate the MRLA Program and will transfer individuals receiving MRLA and HCS-O Program services to the HCS program.

The amendments to §419.155(a), in adding new paragraph (2)(A), revise the HCS Program eligibility criteria to include individuals who are currently enrolled in the MRLA or HCS-O Programs. The amendments also add new paragraph (2)(C) to incorporate the current HCS-O Program criteria and allow individuals who qualify for the HCS-O Program under current rules to enroll in the HCS Program.

The amendments to §419.153 add a definition of "person-directed planning" and amends the definition of "ISP (individual service plan)" to ensure that permanency planning is used in the development of the ISP when the individual is under 22 years of age. In addition, the rule reference is corrected in the definition of "program provider" in §419.153.

The amendments to §419.159(b) require the department to make a determination of LOC (level of care) based on the ICF/MR LOC I or LOC VIII criteria; the current HCS Program rules permitted only an LOC I. In addition, a reference to the ICF/MR Program rules regarding LOC assignment has been changed to clarify the applicable sections.

The amendments to §419.166(a) assure that one important feature of the MRLA Program, the application of the principles of person-directed planning and permanency planning during the development of an individual service plan, is continued in the HCS Program. These planning principles are an important part of a consumer-focused service system that the department wants to ensure are incorporated into all service planning activities.

The department had proposed the repeal of Chapter 419, Subchapter D, governing the HCS Program, in the June 13, 2003, issue of the *Texas Register* (28 TexReg 4520). The proposed repeal was withdrawn in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4883).

The following revisions have been made to the texts of §§419.153, 419.155, and 419.159, as proposed. In §419.153(24), the term "personal outcomes" in the definition of "person-directed planning" is changed to "outcomes" to be consistent with usage elsewhere in the definition and in other sections of the subchapter. In §419.155(a)(2)(C), "TDMHMR" is replaced with "department" to be consistent with usage in other sections of the subchapter. In §§419.155(a)(2)(B) and (C) and 419.159(b), language is added to specify that referenced sections are in the ICF/MR Program rules at Chapter 419, Subchapter E. In addition, the titles of the referenced sections are corrected as are the names of the ICF/MR LOC Criteria. New §419.155(d) provides that when the HCS Program is implemented in an MRA's local service area each individual residing in that local service area who is enrolled in either the MRLA or HCS-O Program will be enrolled automatically in the HCS Program. This change clarifies that an individual currently enrolled in the MRLA or HCS-O Program will not be required to take any action to enroll in the HCS Program under these rules. The new subsection further specifies that enrollment of any other individual in the HCS Program in that local service area must be approved by the department.

A hearing to accept oral and written testimony from members of the public concerning the proposal was held on Friday, July 18, 2003, in Austin, Texas. Testimony was provided by an independent advocate and parent of an individual with mental retardation, Angleton; Advocacy, Inc., Austin; The Arc of Texas, Austin; and Texas Council for Developmental Disabilities, Austin.

Written comments were submitted by a parent/guardian of a state mental retardation facility resident, Garland; Advocacy, Inc., Austin; Austin-Travis County Mental Health and Mental Retardation Center; and Parent Association for the Retarded of Texas (PART), Austin.

While acknowledging that the provisions of new THSC, §533.0355, require the department to change the program model for the delivery of Medicaid waiver services and supports, four commenters expressed disappointment and significant concerns about the change. However, the commenters expressed support for the department's decision to implement new THSC, §533.0355, by transferring individuals receiving MRLA Program services to the HCS Program and consolidating services provided through the Home and Community-Based -- OBRA (HCS-O) Program with the HCS Program. The department acknowledges the commenters' concerns, as well as the expressions of support for the department's implementation of the new statutory provisions.

A commenter representing an advocacy organization also presented personal testimony as the parent of an individual with mental retardation receiving MRLA Program services and supports. The commenter expressed concern that the lack of oversight by an MRA service coordinator, as occurs with the MRLA Program, will "narrow the circle of support" that has benefited the commenter's child and will adversely impact the quality assurance efforts and advocacy activity. The department acknowledges the commenter's concerns.

Two commenters expressed particular concern with the loss of service coordination delivered by a entity other than an individual's program provider. One of the two commenters described independent service coordination as an important key to individual advocacy. The second commenter stated that this change will have an adverse effect on individuals because it eliminates an important feature in the checks and balances of the program; the commenter recommended that additional quality assurance measures be implemented to offset this loss. The department acknowledges the commenters' concern but without specific information from the second commenter concerning types of additional quality assurance measures, the department is unable to respond to the recommendation. The department does note that current quality assurance functions performed by Central Office survey and certification staff will continue.

One commenter recommended that the department convene a workgroup to review both the HCS and the MRLA Programs and make recommendations on the positive and negative aspects of each. The commenter recommended that the workgroup include consumers, family members, advocates, and both public and private program providers. The department notes no changes to the rules were suggested by the commenter but it will take the commenter's recommendation under consideration.

One commenter stated that the amendments do not fully incorporate the best practices of the MRLA Program, such as permanency planning and person-directed planning, noting that while the terms are defined in §419.153, the concepts are not accurately described within the amendments as proposed. The department agrees that the concepts are not described in the amendments, but explains that this is not necessary because extensive descriptions of the permanency planning process are included in three sections of the HCS Program rules for which amendments were not proposed, §419.164(j)-(n) for MRAs, and §419.174(14) and (58)-(60) and §419.175(b)(1)-(4) for program

providers. The department also explains that a session on person-directed planning was included on the agenda for regional training sessions held for MRAs and program providers in late July/early August 2003. The department further notes that *Person-directed Planning and Family Directed Planning Guidelines for Individuals with Mental Retardation* have been distributed to MRAs on numerous occasions, and are available on the department's website at http://www.mhmr.state.tx.us/CentralOffice/LongTermServicesSupports/.

Two commenters recommended that the department revise the definition of "person-directed planning" in §419.153(24) to add "and/or LAR" after "individual" in four places. The commenters stated that individuals who have been determined to have profound mental retardation are not able to direct the development of a plan of services, express any personal outcomes, or express preferences. The commenters further noted that "or" is used in the definition of "service planning team" in §419.153(29). The commenters made a similar recommendation for §419.166(a)(1). The department declines to implement the commenters' recommendation, explaining that the definition as proposed appropriately reflects the department's intent of identifying an individual's outcomes and style of interaction, not those of the individual's LAR. The department further notes that the first sentence of the definition specifies that if the individual has an LAR, the LAR acts on the individual's behalf in directing the development of a plan for services and supports. In addition, the department explains that while the definition of "service planning team" specifies that if an individual has an LAR, both individual and LAR (along with the MRA's service coordinator) are members of the team, the decision to ask other persons to participate on the team is made by an LAR on the individual's behalf.

One commenter commended the department for introducing the person-directed planning feature of the MRLA Program into the HCS Program, but expressed concern with the lack of a definition of "personal outcomes" as used in the definition of "person-directed planning". The department acknowledges the commenter's commendation concerning person-directed planning. Concerning the use of the term "personal outcomes" in the definition of "person-directed planning", the department responds that "personal" has been dropped to be consistent with usage elsewhere in the definition and in other sections of the subchapter.

Three commenters requested the addition of language in §419.155 stating that individuals currently receiving Medicaid waiver services and supports through the MRLA Program will automatically be enrolled in the HCS Program. The department agrees and has added new subsection (d) in §419.155 stating that individuals enrolled in either the MRLA or HCS-O Programs when the HCS Program is implemented in an MRA's local service area will be enrolled automatically in the HCS Program.

Two commenters recommended that two sections of the ICF/MR Program rules (Chapter 419, Subchapter E) referenced in §419.155(a)(2)(B) and (C) and §419.159(b) be added to this subchapter for the convenience of readers. The department responds that the Administrative Procedures Act and *Texas Register* rules specify that new sections cannot be added unless they've been published in the *Texas Register* for public review and comment. In addition, the department's policy is to reference provisions of another rule when necessary, rather than duplicate the provisions. The department notes that it has revised the language which includes the references to specify that the referenced sections are in the ICF/MR Program rules at Chapter 419, Subchapter E.

One commenter expressed concern that §419.166(a)(2)(B), in requiring permanency planning outcomes to be included in the individual service plan (ISP) for an individual under 22 years of age receiving supervised living or residential support, is a provision that is qualitatively different from the principles of permanency planning. The department disagrees with the commenter's conclusion that a qualitative difference exists, noting that the provision merely references a discussion of the permanency planning process in §419.174(14), a section of the HCS Program rules for which amendments had not been proposed. The department also notes that additional discussion of the permanency planning process is found in paragraphs (58)-(60) of the referenced section and in two other sections of the HCS Program rules for which amendments were not proposed, §419.164(j)-(n) for MRAs and §419.175(b)(1)-(4) for program providers.

The same commenter stated that "IDT" is referenced throughout this document when planning processes are intended to be person-directed. The department responds that while the IDT definition does not reference person-directed planning, nothing in the definition prohibits such a process. The department furthers notes that an IDT must, at a minimum include the individual and LAR, the HCS case manager, and a nurse. Further the department has amended the definition of "ISP (individual service plan)" in §419.153(15), added a definition of person-directed planning in new §419.153(24), and added new paragraph (2) in §419.166(a) to address requirements regarding permanency planning and person-directed planning.

The amendments are adopted under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Government Code (TGC), §531.021(a), and the Texas Human Resources Code (THSC), §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the THSC, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the HCS Program.

§419.153. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Actively involved--Significant and ongoing involvement with the individual that the individual's planning team deems to be supportive based on the following:

(A) observed interactions of the person with the individual;

(B) advocacy for the individual;

(C) knowledge of and sensitivity to the individual's preferences, values and beliefs; and

(D) availability to the individual for assistance or support when needed.

(2) Applicant--A Texas resident seeking services in the HCS Program.

(3) CARE--The department's Client Assignment and Registration System, an on-line data entry system that provides demographic and other data about individuals served by the department.

(4) CRCG (Community Resource Coordination Group)--A local interagency group composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The role and responsibilities of the involved agencies, including MRAs, school districts, and providers, are described in §411.56 of this title (relating to Memorandum of Understanding (MOU) on Coordinated Services to Children and Youths).

(5) Department--The Texas Department of Mental Health and Mental Retardation

(6) Family-based alternative--A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(7) HCS--The Home and Community-Based Services Program operated by the department as authorized by the Health Care Financing Administration (HCFA) in accordance with §1915(c) of the Social Security Act.

(8) HCS case manager--An employee of the program provider who is responsible for the overall coordination and monitoring of services provided to an individual enrolled in the HCS Program.

(9) ICF/MR--The Intermediate Care Facilities Program for Persons with Mental Retardation or Related Conditions.

(10) IDT (interdisciplinary team)--A planning team constituted by the program provider for each individual consisting of, at a minimum, the individual and LAR, HCS case manager, and a nurse. Other applicable persons assigned to provide or who are currently providing direct services to the individual and, as appropriate, a physician and other professional personnel may be included as team members as necessary.

(11) IPC (individual plan of care)--A document that describes the type and amount of each HCS program service component to be provided to an individual and describes medical and other services and supports to be provided through non-program resources.

(12) IPC cost--Estimated annual cost of program services included on an IPC.

(13) IPC year--A 12-month period of time starting on the date an authorized initial or renewal IPC begins.

(14) Individual--A person enrolled in the HCS program.

(15) ISP (individual service plan)--A written plan, from which the IPC is derived, developed by the IDT using person-directed planning and, if appropriate, permanency planning. The ISP describes the assessments, recommendations, deliberations, conclusions, justifications and outcomes regarding the specific services provided to the individual by the program provider.

(16) Large ICF/MR--A non-state operated ICF/MR with a Medicaid certified capacity of 14 or more.

(17) LAR (legally authorized representative)--A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(18) LOC (level of care)--A determination given to an individual as part of the eligibility determination process based on data submitted on the MR/RC Assessment.

(19) LON (level of need)--An assignment given by the department to an individual upon which reimbursement for foster/companion care, supervised living, residential support and day habilitation is based. The LON assignment is derived from the service level score obtained from the administration of the Inventory for Client and Agency Planning (ICAP) to the individual and from selected items on the MR/RC Assessment.

(20) MRA (mental retardation authority)--An entity to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation, and for supervising and ensuring the provision of mental retardation services to people with mental retardation in one or more local service areas.

(21) MR/RC Assessment--A form used by the department for LOC determination and LON assignment.

(22) Natural support network--Those persons, including family members, church members, neighbors, and friends, who assist and sustain an individual with supports that occur naturally within the individual's environment and that are not reimbursed or purposely developed by a person or system.

(23) PDP (person-directed plan)--A plan developed for an applicant in accordance with §419.164 of this title (relating to Process for Enrollment of Applicants) that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or the applicant's LAR on behalf of the applicant.

(24) Person-directed planning--A process that empowers the individual (and the LAR on the individual's behalf) to direct the development of a plan for supports and services that meet the individual's outcomes. The process:

(A) identifies existing supports and services necessary to achieve the individual's outcomes;

(B) identifies natural supports available to the individual and negotiates needed services system supports;

(C) occurs with the support of a group of people chosen by the individual (and the LAR on the individual's behalf); and

(D) accommodates the individual's style of interaction and preferences regarding time and setting.

(25) Permanency Planning--A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(26) Permanency Planning Review Screen--A screen in CARE that, when completed by an MRA or program provider, identifies community supports needed to achieve an individual's permanency planning outcomes and provides information necessary for approval to provide supervised living or residential support to the individual.

(27) Program provider--An entity that provides HCS Program services under a waiver program provider agreement with the department as defined in Chapter 419, Subchapter Q of this title (relating to Enrollment of Medicaid Waiver Program Providers).

(28) Service coordinator--An employee of an MRA responsible for assisting an individual or the individual's LAR on behalf of the individual in accessing medical, social, educational, and other appropriate services including HCS Program services

(29) Service planning team--A planning team constituted by an MRA consisting of an applicant, the applicant's LAR, service coordinator, and other persons chosen by the applicant or the LAR on behalf of the applicant.

§419.155. Eligibility Criteria.

(a) An applicant or individual is eligible for HCS program services if he or she:

(1) meets the financial eligibility criteria as defined in subsection (b) of this section;

(2) meets one of the following criteria:

(A) is enrolled in the MRLA or HCS-O Program immediately prior to enrollment in the HCS Program;

(B) qualifies for the ICF/MR level of care (LOC) I as defined in §419.238 of this title (relating to Level of Care I Criteria) in ICF/MR Program rules at Chapter 419, Subchapter E, as determined by the department according to §419.159 of this title (relating to Level of Care Determination); and

(i) has had a determination of mental retardation performed in accordance with state law (Texas Health and Safety Code, Chapter 593, Admission and Commitment to Mental Retardation Services, Subchapter A); or

(ii) has been diagnosed by a licensed physician as having a related condition as defined in §419.203 of this title (relating to Definitions) prior to enrollment in the HCS Program; or

(C) qualifies for the ICF/MR LOC I as defined in §419.238 of this title (relating to Level of Care Criteria I) or ICF/MR VIII LOC as defined in §419.239 of this title (relating to ICF/MR Level of Care VIII Criteria) in ICF/MR Program rules at Chapter 419, Subchapter E, as determined by the department according to §419.159 of this title (relating to Level of Care Determination), and has been determined by the department or TDHS:

(i) to have mental retardation or a related condition;

(ii) to need specialized services; and

(iii) to be inappropriately placed in a Medicaid certified nursing facility based on an annual resident review conducted in accordance with the requirements of Texas Administrative Code, Title 40, §19.2500; and

(3) has an approved IPC for which the IPC cost does not exceed 125% of the annual ICF/MR reimbursement rate paid to a small ICF/MR, as defined in 1 TAC §355.456 (relating to Rate Setting Methodology) for the individual's level of need as it would be assigned under §419.240 of this title (relating to Level of Need) or 125% of the estimated annualized per capita cost for ICF/MR services, whichever is greater.

(b) An applicant or individual is financially eligible for the HCS Program if he or she:

(1) is categorically eligible for Supplemental Security Income (SSI) benefits;

(2) has once been eligible for and received SSI benefits and continues to be eligible for Medicaid as a result of protective coverage mandated by federal law;

(3) is under age 18 and:

(A) residing with parents or a spouse;

(B) eligible for Medicaid benefits only if institutionalized;

(C) meets the SSI criteria for disability;

(D) meets the SSI criteria for institutional deeming; and

(E) has income and resources which meet the requirements of the SSI program; or

(4) is under age 19 and financially the responsibility of the Texas Department of Protective and Regulatory Services (TDPRS), in whole or in part (not to exceed Level II foster care payment), and being cared for in a family foster home licensed or certified and supervised by:

(A) TDPRS; or

(B) a licensed public or private nonprofit child placing agency; or

(5) is a member of a family who receives full Medicaid benefits as a result of qualifying for Temporary Aid to Needy Families (TANF); or

(6) is eligible for SSI benefits in the community, except on the basis of income, and meets the special institutional income limit for Medicaid benefits in Texas without regard to spousal income.

(c) For individuals with spouses who live in the community, the income and resource eligibility requirements are determined according to the spousal impoverishment provisions in the Social Security Act, §1924 and as specified in the Medicaid State Plan.

(d) When the HCS Program is implemented in an MRA's local service area, an individual who is a resident and who is enrolled in the MRLA Program or HCS-O Program will be enrolled automatically in the HCS Program. Enrollment of any other individual in the HCS Program in that local service area must be approved by the department.

§419.159. Level of Care (LOC) Determination.

(a) A LOC for an individual must be requested from the department by electronically transmitting a completed MR/RC Assessment, indicating the recommended LOC. The electronically transmitted MR/RC Assessment must contain information identical to the information on the signed MR/RC Assessment

(b) The department will make an LOC determination in accordance with §419.238 of this title (relating to LOC I Criteria) and §419.239 of this title (relating to ICF/MR LOC VIII Criteria) in ICF/MR Program rules at Chapter 419, Subchapter E based on the department's review of information reported on the applicant's or individual's MR/RC Assessment.

(c) Information on the MR/RC Assessment must supported by current data obtained from standardized evaluations and formal assessments that measure physical, emotional, social and cognitive factors. The signed MR/RC Assessment and documentation supporting the recommended LOC must be maintained in the individual's record.

(d) The department will approve and enter the appropriate LOC into the HCS billing and enrollment system or send written notification to the program provider that a LOC has been denied.

(e) A LOC determination is valid for 364 calendar days after the LOC effective date determined by the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2003.

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Rodolfo Arredondo
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-5232

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SUBCHAPTER Q. ENROLLMENT OF MEDICAID WAIVER PROGRAM PROVIDERS

25 TAC §419.709

The Texas Department of Mental Health and Mental Retardation (department) adopts amendments to §419.709, concerning additional provider certification, with changes to the text as published in the July 4, 2003, issue of the *Texas Register* (28 TexReg 5086).

A notice of correction was published in the July 11, 2003, issue of the *Texas Register* explaining that references to the Home and Community-based Services -- OBRA (HCS-O) Program providers in new subsections (a) and (b) had been incorrectly proposed for deletion.

The amendments to the rule governing the additional certification of Medicaid waiver program providers are responsive to new Texas Health and Safety Code (THSC), §533.0355, added by House Bill 2292 (HB 2292), §2.76, 78th Legislature, 2003. New §533.0355 redefines the responsibilities of mental retardation authorities (MRAs), program providers, and the department under the Mental Retardation Local Authority (MRLA) Program, another department-operated Medicaid waiver program. The redefined responsibilities describe a program model that more closely resembles that of the HCS Program than the MRLA Program. The department determined that the most efficacious manner to implement the redefined waiver program responsibilities mandated by §533.0355 is to provide all waiver services and supports through the HCS Program. Therefore, coinciding with the September 1, 2003, effective date of the relevant provisions of HB 2292, the department will no longer operate the MRLA Program and will transfer individuals receiving MRLA and HCS-O Program services to the HCS program.

The amendments permit the department to convert MRLA and HCS-O Program providers into HCS Program providers. Other amendments delete references to MRLA Program providers and HCS-O Program providers in provisions addressing the Texas Home Living (TxHmL) Program.

Subsections (a) and (b) are revised upon adoption to reinstate references to HCS-O Program providers which had been proposed for deletion.

A hearing to accept oral and written testimony from members of the public concerning the proposal was held on Friday, July 18, 2003, in Austin, Texas. No testimony was offered and no comments were received concerning the amendments to §419.709.

The amendments are adopted under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Government Code (TGC), §531.021(a), and the Texas Human Resources Code (THSC), §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the THSC, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the HCS, HCS-O, and MRLA Programs.

§419.709. Additional Provider Certification.

(a) TDMHMR may provisionally certify as an HCS provider a provisionally certified MRLA or HCS-O provider.

(b) TDMHMR may certify as an HCS provider a certified MRLA or HCS-O provider.

(c) Upon request of an MRA, TDMHMR may provisionally certify the MRA as a Texas Home Living (TxHmL) Program provider.

(d) Upon request of a provisionally certified HCS program provider, TDMHMR may provisionally certify an HCS program provider as a TxHmL provider.

(e) Upon request of a certified HCS program provider, TDMHMR may certify an HCS program provider as a TxHmL provider.

(f) Corrective actions or sanctions pending at the time of certification or provisional certification under subsection (a) or (b) of this section will remain in effect until resolved. If not resolved, TDMHMR may impose sanctions in accordance with §409.537 of this title (related to Sanctions).

(g) TDMHMR may deny provisional certification or certification for good cause, which includes but is not limited to corrective actions or sanctions that are pending against the HCS, HCS-O, or MRLA provider.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Rodolfo Arredondo
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-5232

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 330. MUNICIPAL SOLID WASTE

The Texas Commission on Environmental Quality (commission) adopts amendments to §§330.2, 330.3, 330.14, 330.51, 330.53, 330.56, 330.64, 330.230, 330.231, 330.235, 330.238, 330.242, 330.303 - 330.305, 330.415, and 330.416. Sections 330.2,

330.51, 330.56, 330.238, 330.242, and 330.416 are adopted *with changes* to the proposed text as published in the May 30, 2003 issue of the *Texas Register* (28 TexReg 4238). Sections 330.3, 330.14, 330.53, 330.64, 330.230, 330.231, 330.235, 330.303 - 330.305, and 330.415 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 405, 77th Legislature, established the Texas Board of Professional Geoscientists and the regulation of professional geoscientists. The Texas Geoscience Practice Act (the Act) requires that a person may not take responsible charge of a geoscientific report or a geoscientific portion of a report required by state agency rule unless the person is licensed through the Texas Board of Professional Geoscientists. The primary purpose of the amendments is to establish regulations for the public practice of geoscience in conformance with the Act by requiring a person who prepares and submits geoscientific information to the commission to be a licensed professional geoscientist. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. According to the bill analysis prepared at the time of passage, the ultimate purpose of the Act was public safety through the public registration of the practice of geoscience.

SECTION BY SECTION DISCUSSION

Adopted §330.2, Definitions, amends the introductory paragraph by deleting the word "shall" and the phrase "unless the context clearly indicates otherwise." The definition of licensed professional geoscientist is added as new paragraph (67). The definition of qualified groundwater scientist is renumbered as paragraph (107) and revised to replace "scientist or engineer" with "licensed geoscientist or licensed engineer." The definition of special waste is renumbered as paragraph (135) and revised to update citations. The definitions of commission, EPA, executive director, person, RCRA, and SWDA are deleted because they are defined in 30 TAC §3.2, concerning Definitions, and TWC and TACB are deleted because they are no longer used. The definitions of shall and should are deleted because the Legislative Council's Drafting Manual discusses the use of shall and certain other words for the purpose of drafting regulatory requirements or prohibitions or authorizing certain powers. The subsequent paragraphs are renumbered accordingly. Administrative changes are made in paragraphs (8), (72), (135), and (137) from proposal to correct punctuation and typographical errors.

The commission adopts several revisions to §330.3, Applicability, including the addition of acronyms (e.g., "MSW" in subsections (a) and (h) and "MSWLFs" in subsection (b)), and correction of references in subsections (c) and (e) - (g). In subsection (f), a change is adopted to indicate that a professional engineer must be licensed to practice in Texas, rather than being registered to practice.

Adopted §330.14, Arid Exemption Process, amends paragraphs (8) and (9) by eliminating the phrase "where appropriate" because the sealing of work done for the public by licensed professional geoscientists or engineers will always be appropriate. The term "groundwater scientist" is substituted for "groundwater professional" in paragraph (9). Adopted §330.14 also includes several administrative formatting corrections (e.g., correcting the name of the agency from "Texas Water Commission" to "Texas Commission on Environmental Quality").

Adopted §330.51(d), Permit Application for Municipal Solid Waste Facilities, makes the legal citation to the Act and to the Engineering Practice Act. Subsection (d)(1) states the responsibilities of the responsible engineer more concisely and corrects the section number and title of the citation in the Texas Administrative Code governing the use of engineers' seals. The commission adopts new subsection (d)(2) which requires the responsible licensed professional geoscientist to seal, sign, and date applicable items as required by the Act and in accordance with any rules subsequently adopted by the Texas Board of Professional Geoscientists concerning geoscientists' seals. Previously existing subsection (d)(2) is renumbered as subsection (d)(3). An administrative change is made in subsection (a)(2) from proposal to delete a cross-reference title.

The commission adopts amended §330.53(b)(11)(A) to simplify the double preposition. In addition, the commission adopts several administrative revisions, including correction of the statutory citation to the Texas Health and Safety Code, addition of acronyms, addition of introductory clauses for grammatical clarity, and correction of rule references to 30 TAC Chapter 301, concerning Levee Improvement Districts, District Plans of Reclamation, and Levees and Other Improvements.

The commission adopts revisions to §330.56, Attachments to the Site Development Plan, which involve correcting typographical errors and acronyms, rearranging wording and rewording to provide a more accurate description (e.g., replacing "after-level" with "after-equilibrium" in subsection (d)(5)(C)(i)), and correcting rule references (e.g., changing the reference from §330.200 to §330.241 in subsection (e)(6) - (8) and other rule reference corrections in subsection (k)). Administrative changes are made in subsections (d) and (n) from proposal to correct formatting and typographical errors.

Adopted §330.64, Additional Standard Permit Conditions for Municipal Solid Waste Facilities, requires that all revised drawings prepared by a licensed professional engineer or a licensed professional geoscientist shall be signed and sealed in accordance with the Act. The commission adopts a streamlining measure by deleting existing §330.64(a), because the permit or permit amendment is based on earlier submissions, and the post-permit issuance or post-permit amendment issuance versions of the site development plan are considered to be unnecessary. The remaining subsections are relettered to account for this deletion. Other adopted revisions to §330.64 are the addition of acronyms and the term "executive director" to replace outdated references and streamlining the rule language in §330.64(b) to refer to the application requirements of §330.51(e) instead of repeating those requirements in relettered subsection (b). The commission also adopts adding requirements for geoscientific plans and reports to relettered subsection (b), with similar signing and sealing requirements for geoscientists as are currently required for engineers.

Adopted §330.230, Applicability, corrects rule references and deletes obsolete language. In subsection (a), the commission adds the statement, "Owners and operators of MSWLF units shall comply with the groundwater monitoring requirements of this subchapter." This statement retains the requirement to comply with groundwater monitoring requirements which had been specified in previously existing subsections (c) and (d) which are now deleted.

Adopted §330.231(e), Groundwater Monitoring Systems, substitutes "must" for "shall" as discussed previously in this preamble and deletes unneeded language in references.

Adopted §330.235, Assessment Monitoring Program, makes acronym additions and nonsubstantive corrections to rule language and references.

Adopted §330.238, Implementation of the Corrective Action Program, corrects rule references and makes nonsubstantive changes to rule language. Administrative changes are made in subsection (e) from proposal to correct formatting errors.

Adopted §330.242(a), Monitor-Well Construction Specifications, removes an unnecessary hyphen between "solid" and "waste." Other nonsubstantive changes to rule language are adopted. In subsection (a)(1)(A) and (D), the term "licensed professional geoscientist" is substituted for "qualified geologist." The commission adopts a rule reference correction in subsection (g) relating to plugging and abandonment of monitoring wells. An administrative change is made in subsection (a)(2)(A) from proposal to spell out an acronym.

Adopted §330.303(b), Fault Areas, replaces the demonstrative adjective "such" with specific references to studies or conditions of differential subsidence or faulting; replaces "geologist" with "licensed professional geoscientist"; and adds "licensed" before "professional engineer." Other revisions to §330.303(b) are minor editorial revisions.

Adopted §330.304, Seismic Impact Zones, and adopted §330.305, Unstable Areas, substitute "must" for "shall" as discussed previously in this preamble.

Adopted §330.415(c), Additional Requirements for Municipal Solid Waste Mining Facilities, replaces the phrase "a Registered Professional Engineer" with "the licensed professional engineer"; replaces an indefinite article with the definite article; and requires that all revised geological drawings be signed and sealed by the licensed professional geoscientist responsible for their preparation and included in the loose-leaf binder.

Adopted §330.416(f), Registration Application Preparation, corrects the use of the demonstrative pronoun by substituting "that" for "which" to introduce the restrictive clause describing the soil boring plan; and changes a future tense to present tense. The phrases "soil boring plan" and "site development plan" are lowercased throughout the section. In subsections (a) and (m)(1), the term "registered" is replaced by "licensed" before "professional engineer." Adopted subsection (m) recognizes the agency accepted use of "groundwater" as a single word; inserts four necessary commas; lowercases the phrase "unified soil classification"; replaces the demonstrative pronoun introducing a restrictive clause by a conjunction; replaces a comma with a semicolon; and substitutes the word "licensed" for "registered" before "professional engineer." Administrative changes are made in subsections (h) and (m) from proposal to correct formatting and typographical errors.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rules is to establish regulations allowing for the public practice of geoscience in agency procedures in conformance with the Act. The Act requires that a person may not take responsible charge of a geoscientific report or a geoscientific portion of a report required by a state agency rule unless the person is licensed through the Texas Board of Professional Geoscientists. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. The adopted rules are not specifically intended to protect the environment or reduce risks to human health. The adopted rules are intended to establish procedures to require that specific reports and necessary data submitted to the commission be produced, signed, sealed, and dated by licensed professional geoscientists who have obtained their licenses through the Texas Board of Professional Geoscientists, and to make other corrections to the rules. Therefore, it is not anticipated that the adopted rules will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that these adopted rules do not meet the definition of major environmental rule.

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, the amendments are not subject to Texas Government Code, §2001.0225, because they do not accomplish any of the four results specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted amendments to Chapter 330 do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the adopted rules do not exceed an express requirement of state law. Third, there is no delegation agreement that would be exceeded by these adopted rules. Fourth, the commission adopts these rules to allow for the public practice of geoscience in agency procedures in conformance with the Act. Therefore, the commission does not adopt the rules solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific intent of the rules is to establish regulations allowing for the public practice of geoscience in agency procedures in conformance with the Act. The rules would substantially advance this stated purpose by requiring that specific reports and necessary data submitted to the commission be produced, signed, sealed, and dated by licensed professional geoscientists who have obtained their licenses through the Texas Board of Professional Geoscientists.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the rules do not affect a landowner's rights in private real property by burdening private real property, nor restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise

exist in the absence of the adopted rulemaking. These rules simply require that specific portions of applications or necessary data submitted to the commission be produced, signed, sealed, and dated by a qualified professional individual who has demonstrated his or her qualifications by obtaining a license to engage in the public practice of geoscience from the Texas Board of Professional Geoscientists. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. These rules do not affect any private real property.

There are no burdens imposed on private real property, and the benefits to society are better applications for environmental permits based upon reliable reports and data submitted by qualified licensed professional geoscientists.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the construction and operation of solid waste treatment, storage, and disposal facilities, and the discharge of municipal and industrial wastewater to coastal waters. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because the adopted rule changes do not modify or alter standards set forth in existing rules, and do not govern or authorize any actions subject to the CMP. The adopted rulemaking would require a person who prepares and submits geoscientific information to the agency to be a licensed professional geoscientist. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act.

PUBLIC COMMENT

A public hearing was not held on this rulemaking and no comments were received during the comment period, which closed June 30, 2003.

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §§330.2, 330.3, 330.14

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; Texas Health and Safety Code, §361.024, which authorizes the commission to establish standards of operation for the management and control of solid waste; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§330.2. Definitions.

Unless otherwise noted, all terms contained in this section are defined by their plain meaning. This section contains definitions for terms that appear throughout this chapter. Additional definitions may appear in the specific section to which they apply. As used in this chapter, words in the masculine gender also include the feminine and neuter genders, words in the feminine gender also include the masculine and neuter genders; words in the singular include the plural and words in the plural include the singular. The following words and terms, when used in this chapter, have the following meanings.

(1) 100-year flood--A flood that has a 1.0% or greater chance of recurring in any given year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

(2) Acid--A substance containing hydrogen that will release hydrogen (hydronium) ions when dissolved in water. Acids will have a pH of less than 7.0 and usually have a sour taste and will cause blue litmus dye to turn red.

(3) Active life--The period of operation beginning with the initial receipt of solid waste and ending at certification/completion of closure activities in accordance with §§330.250 - 330.253 of this title (relating to Closure and Post-Closure).

(4) Active portion--That part of a facility or unit that has received or is receiving wastes and that has not been closed in accordance with §§330.250 - 330.253 of this title.

(5) Airport--A public-use airport open to the public without prior permission and without restrictions within the physical capacities of available facilities.

(6) Aquifer--A geological formation, group of formations, or portion of a formation capable of yielding significant quantities of groundwater to wells or springs.

(7) Areas susceptible to mass movements--Areas of influence (i.e., areas characterized as having an active or substantial possibility of mass movement) where the movement of earth material at, beneath, or adjacent to the municipal solid waste landfill unit, because of natural or man-induced events, results in the downslope transport of soil and rock material by means of gravitational influence. Areas of mass movement include, but are not limited to, landslides, avalanches, debris slides and flows, soil fluction, block sliding, and rock fall.

(8) Asbestos-containing materials--Include the following.

(A) Category I nonfriable asbestos-containing material (ACM) means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1.0% asbestos as determined using the method specified in Appendix A, Subpart F, 40 Code of Federal Regulations (CFR), Part 763, §1, Polarized Light Microscopy (40 CFR Part 763, §1).

(B) Category II nonfriable ACM means any material, excluding Category I nonfriable ACM, containing more than 1.0% asbestos as determined using the methods specified in 40 CFR Part 763, §1, that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(C) Friable ACM means any material containing more than 1.0% asbestos that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.

(D) Nonfriable ACM means any material containing more than 1.0% asbestos that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(9) ASTM--The American Society of Testing and Materials.

(10) Battery--An electrochemical device that generates electric current by converting chemical energy. Its essential components are positive and negative electrodes made of more or less electrically conductive materials, a separate medium, and an electrolyte. There are four major types:

(A) primary batteries (dry cells);

(B) storage or secondary batteries;

(C) nuclear and solar cells or energy converters; and

(D) fuel cells.

(11) Battery acid (also known as electrolyte acid)--A solution of not more than 47% sulfuric acid in water suitable for use in storage batteries, which is water white, odorless, and practically free from iron.

(12) Battery retailer--A person or business location that sells lead-acid batteries to the general public, without restrictions to limit purchases to institutional or industrial clients only.

(13) Battery wholesaler--A person or business location that sells lead-acid batteries directly to battery retailers, to government entities by contract sale, or to large-volume users, either directly or by contract sale.

(14) Bird hazard--An increase in the likelihood of bird/aircraft collisions that may cause damage to an aircraft or injury to its occupants.

(15) Brush--Cuttings or trimmings from trees, shrubs, or lawns and similar materials.

(16) Buffer zone--A zone free of municipal solid waste processing and disposal activities adjacent to the site boundary.

(17) CFR--Code of Federal Regulations.

(18) Citizens' collection station--A facility established for the convenience and exclusive use of residents (not commercial or industrial users or collection vehicles). The facility may consist of one or more storage containers, bins, or trailers.

(19) Class I industrial solid waste--See industrial solid waste.

(20) Collection--The act of removing solid waste (or materials that have been separated for the purpose of recycling) for transport elsewhere.

(21) Collection system--The total process of collecting and transporting solid waste. It includes storage containers; collection crews, vehicles, equipment and management; and operating procedures. Systems are classified as municipal, contractor, or private.

(22) Commercial solid waste--All types of solid waste generated by stores, offices, restaurants, warehouses, and other nonmanufacturing activities, excluding residential and industrial wastes.

(23) Compacted waste--Waste that has been reduced in volume by a collection vehicle or other means including, but not limited to, dewatering, composting, incineration, and similar processes, with the exception of waste that has been reduced in volume by a small, in-house compactor device owned and/or operated by the generator of the waste.

(24) Composite liner--A liner system consisting of two components: the upper component must consist of a minimum 30-mil flexible membrane liner (FML) or minimum 60-mil high-density polyethylene and the lower component must consist of at least a two-foot layer of compacted soil with a hydraulic conductivity of no more than 1×10^{-7} cm/sec. The FML component must be installed in direct and uniform contact with the compacted soil component.

(25) Compost--The stabilized product of the decomposition process that is used or sold for use as a soil amendment, artificial top soil, growing medium amendment, or other similar uses.

(26) Composting--The controlled biological decomposition of organic materials through microbial activity.

(27) Conditionally exempt small-quantity generator--A person who generates no more than 220 pounds of hazardous waste in a calendar month.

(28) Construction-demolition waste--Waste resulting from construction or demolition projects; includes all materials that are directly or indirectly the by-products of construction work or that result from demolition of buildings and other structures, including, but not limited to, paper, cartons, gypsum board, wood, excelsior, rubber, and plastics.

(29) Contaminate--The man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of ground or surface water.

(30) Controlled burning--The combustion of solid waste with control of combustion air to maintain adequate temperature for efficient combustion; containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and control of the emission of the combustion products, i.e., incineration in an incinerator.

(31) Discard--To abandon a material and not use, reuse, reclaim, or recycle it. A material is abandoned by being disposed of; burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy); or physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed.

(32) Discharge--Includes deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release, or to allow, permit, or suffer any of these acts or omissions.

(33) Discharge of dredged material--Any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area.

(34) Discharge of fill material--The addition of fill material into waters of the United States. The term generally includes placement of fill necessary to the construction of any structure in waters of the United States: the building of any structure or improvement requiring rock, sand, dirt, or other inert material for its construction; the building of dams, dikes, levees, and riprap.

(35) Discharge of pollutant--Any addition of any pollutant to navigable waters from any point source or any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source.

(36) Displacement--The measured or estimated distance between two formerly adjacent points situated on opposite walls of a fault (synonymous with net slip).

(37) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

(38) Dredged material--Material that is excavated or dredged from waters of the United States.

(39) Drinking-water intake--The point at which water is withdrawn from any water well, spring, or surface water body for use as drinking water for humans, including standby public water supplies.

(40) Elements of nature--Rainfall, snow, sleet, hail, wind, sunlight, or other natural phenomenon.

(41) Endangered or threatened species--Any species listed as such under Federal Endangered Species Act, §4, 16 United States Code, §1536, as amended or under the Texas Endangered Species Act.

(42) Essentially insoluble--Any material that, if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of the maximum contaminant levels in 40 Code of Federal Regulations (CFR) Part 141, Subparts B and G, and 40 CFR Part 143 for total dissolved solids.

(43) Existing municipal solid waste landfill unit--Any municipal solid waste landfill unit that received solid waste as of October 9, 1993. Waste placement in existing units must be consistent with past operating practices or modified practices to ensure good management.

(44) Experimental project--Any new proposed method of managing municipal solid waste, including resource and energy recovery projects, that appears to have sufficient merit to warrant commission approval.

(45) Facility--All contiguous land and structures, other appurtenances, and improvements on the land used for the storage, processing, or disposal of solid waste.

(46) Fault--A fracture or a zone of fractures in any material along which strata, rocks, or soils on one side have been displaced with respect to those on the other side.

(47) Fill material--Any material used for the primary purpose of filling an excavation.

(48) Floodplain--The lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, that are inundated by the 100-year flood.

(49) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, handling, and sale of produce and other food products.

(50) Gas condensate--The liquid generated as a result of any gas recovery process at a municipal solid waste facility.

(51) Generator--Any person, by site or location, whose act or process produces a solid waste or first causes it to become regulated.

(52) Groundwater--Water below the land surface in a zone of saturation.

(53) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the EPA under the federal Solid Waste Disposal Act, as amended by RCRA, 42 United States Code, §§6901 *et seq*., as amended.

(54) Holocene--The most recent epoch of the Quaternary Period, extending from the end of the Pleistocene Epoch to the present.

(55) Household waste--Any solid waste (including garbage, trash, and sanitary waste in septic tanks) derived from households (including single and multiple residences, hotels, and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas); does not include yard waste or brush that is completely free of any household wastes.

(56) Industrial hazardous waste--Hazardous waste determined to be of industrial origin.

(57) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class I industrial solid waste or Class I waste is any industrial solid waste designated as Class I by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 of this title (relating to Definitions) and §335.505 of this title (relating to Class 1 Waste Determination).

(B) Class II industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class I or Class III, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class III industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(58) Inert material--A naturally occurring nonputrescible material that is essentially insoluble such as soil, dirt, clay, sand, gravel, and rock.

(59) In situ--In natural or original position.

(60) Karst terrain--An area where karst topography, with its characteristic surface and/or subterranean features, is developed principally as the result of dissolution of limestone, dolomite, or other soluble rock. Characteristic physiographic features present in karst terrains include, but are not limited to, sinkholes, sinking streams, caves, large springs, and blind valleys.

(61) Lateral expansion--A horizontal expansion of the waste boundaries of an existing municipal solid waste landfill unit.

(62) Land application of solid waste--The disposal or use of solid waste (including, but not limited to, sludge or septic tank pumpings or mixture of shredded waste and sludge) in which the solid waste is applied within three feet of the surface of the land.

(63) Leachate--A liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste.

(64) Lead--The metal element, atomic number 82, atomic weight 207.2, with the chemical symbol Pb.

(65) Lead acid battery--A secondary or storage battery that uses lead as the electrode and dilute sulfuric acid as the electrolyte and is used to generate electrical current.

(66) License--

(A) A document issued by an approved county authorizing and governing the operation and maintenance of a municipal solid waste facility used to process, treat, store, or dispose of municipal solid waste, other than hazardous waste, in an area not in the territorial limits or extraterritorial jurisdiction of a municipality.

(B) An occupational license as defined in Chapter 30 of this title (relating to Occupational Licenses and Registrations).

(67) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(68) Liquid waste--Any waste material that is determined to contain "free liquids" as defined by EPA Method 9095 (Paint Filter Test), as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Publication Number SW-846).

(69) Litter--Rubbish and putrescible waste.

(70) Lower explosive limit--The lowest percent by volume of a mixture of explosive gases in air that will propagate a flame at 25 degrees Celsius and atmospheric pressure.

(71) Man-made inert material--Those non-putrescible, essentially insoluble materials fabricated by man that are not included under the definition of rubbish.

(72) Medical waste--Waste generated by health care-related facilities and associated with health care activities, not including garbage or rubbish generated from offices, kitchens, or other non-health care activities. The term includes special waste from health care-related facilities which is comprised of animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps as those terms are defined in 25 TAC §1.132 (relating to Definitions). The term does not include medical waste produced on farmland and ranchland as defined in Agriculture Code, §252.001(6) (Definitions - Farmland or ranchland), nor does the term include artificial, nonhuman materials removed from a patient and requested by the patient, including, but not limited to, orthopedic devices and breast implants.

(73) Monofill--A landfill or landfill trench into which only one type of waste is placed.

(74) MSWLF--Municipal solid waste landfill facility.

(75) Municipal hazardous waste--Any municipal solid waste or mixture of municipal solid wastes that has been identified or listed as a hazardous waste by the administrator of the EPA.

(76) Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

(77) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(78) Municipal solid waste landfill unit--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of RCRA Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(79) Municipal solid waste site--A plot of ground designated or used for the processing, storage, or disposal of solid waste.

(80) Navigable waters--The waters of the United States, including the territorial seas.

(81) New municipal solid waste landfill unit--Any municipal solid waste landfill unit that has not received waste prior to October 9, 1993.

(82) Nonpoint source--Any origin from which pollutants emanate in an unconfined and unchanneled manner, including, but not limited to, surface runoff and leachate seeps.

(83) Non-RACM--Non-regulated asbestos-containing material as defined in 40 Code of Federal Regulations Part 61. This is asbestos material in a form such that potential health risks resulting from exposure to it are minimal.

(84) Nuisance--Municipal solid waste that is stored, processed, or disposed of in a manner that causes the pollution of the surrounding land, the contamination of groundwater or surface water, the breeding of insects or rodents, or the creation of odors adverse to human health, safety, or welfare.

(85) Open burning--The combustion of solid waste without:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of the emission of the combustion products.

(86) Operate--To conduct, work, run, manage, or control.

(87) Operating record--All plans, submittals, and correspondence for a municipal solid waste landfill facility required under this chapter; required to be maintained at the facility or at a nearby site acceptable to the executive director.

(88) Operation--A municipal solid waste site or facility is considered to be in operation from the date that solid waste is first received or deposited at the municipal solid waste site or facility until the date that the site or facility is properly closed in accordance with this chapter.

(89) Operator--The person(s) responsible for operating the facility or part of a facility.

(90) Opposed case--A case when one or more parties appear, or make their appearance, in opposition to an application and are designated as opponent parties by the hearing examiner either at or before the public hearing on the application.

(91) Other regulated medical waste--Medical waste that is not included within special waste from health care-related facilities but that is subject to special handling requirements within the generating facility by other state or federal agencies, excluding medical waste subject to 25 TAC Chapter 289 (concerning Radiation Control).

(92) Owner--The person who owns a facility or part of a facility.

(93) PCB--Polychlorinated biphenyl molecule.

(94) Polychlorinated biphenyl waste(s)--Those polychlorinated biphenyls (PCBs) and PCB items that are subject to the disposal requirements of 40 Code of Federal Regulations (CFR) Part 761. Substances that are regulated by 40 CFR Part 761 include, but are

not limited to: PCB articles, PCB article containers, PCB containers, PCB-contaminated electrical equipment, PCB equipment, PCB transformers, recycled PCBs, capacitors, microwave ovens, electronic equipment, and light ballasts and fixtures.

(95) Permit--A written permit issued by the commission that, by its conditions, may authorize the owner or operator to construct, install, modify, or operate a specified municipal solid waste storage, processing, or disposal facility in accordance with specific limitations.

(96) Point of compliance--A vertical surface located no more than 500 feet from the hydraulically downgradient limit of the waste management unit boundary, extending down through the uppermost aquifer underlying the regulated units, and located on land owned by the owner of the permitted facility.

(97) Point source--Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, or discrete fissure from which pollutants are or may be discharged.

(98) Pollutant--Contaminated dredged spoil, solid waste, contaminated incinerator residue, sewage, sewage sludge, munitions, chemical wastes, or biological materials discharged into water.

(99) Pollution--The man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of an aquatic ecosystem.

(100) Poor foundation conditions--Areas where features exist which indicate that a natural or man- induced event may result in inadequate foundation support for the structural components of a municipal solid waste landfill unit.

(101) Population equivalent--The hypothetical population that would generate an amount of solid waste equivalent to that actually being managed based on a generation rate of five pounds per capita per day and applied to situations involving solid waste not necessarily generated by individuals. It is assumed, for the purpose of these sections, that the average volume per ton of waste entering a municipal solid waste disposal facility is three cubic yards. For the purposes of these sections, the following population equivalents shall apply:

(A) 8,000 persons - 20 tons per day or 60 cubic yards per day;

(B) 5,000 persons - 12 1/2 tons or 37 1/2 cubic yards per day;

(C) 1,500 persons - 3 3/4 tons or 11 1/4 cubic yards per day;

(D) 1,000 persons - 225 pounds of wastewater treatment plant sludge per day (dry-weight basis).

(102) Post-consumer waste--A material or product that has served its intended use and has been discarded after passing through the hands of a final user. For the purposes of this subchapter, the term does not include industrial or hazardous waste.

(103) Premises--A tract of land with the buildings thereon, or a building or part of a building with its grounds or other appurtenances.

(104) Processing--Activities including, but not limited to, the extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of hazardous waste, designed to change the physical, chemical, or biological character or composition of any hazardous waste to neutralize such waste, or to recover energy or material from the waste, or to render such waste nonhazardous or less hazardous; safer to transport, store, dispose of, or make it amenable for recovery, amenable for storage, or reduced in volume. Unless the executive director determines that regulation of such activity under these rules is necessary to protect human health or the environment, the definition of "processing" does not include activities relating to those materials exempted by the administrator of the EPA under the federal Solid Waste Disposal Act, as amended by RCRA, 42 United States Code, §§6901 *et seq*., as amended.

(105) Public highway--The entire width between property lines of any road, street, way, thoroughfare, bridge, public beach, or park in this state, not privately owned or controlled, if any part of the road, street, way, thoroughfare, bridge, public beach, or park is opened to the public for vehicular traffic, is used as a public recreational area, or is under the state's legislative jurisdiction through its police power.

(106) Putrescible waste--Organic wastes, such as garbage, wastewater treatment plant sludge, and grease trap waste, that is capable of being decomposed by microorganisms with sufficient rapidity as to cause odors or gases or is capable of providing food for or attracting birds, animals, and disease vectors.

(107) Qualified groundwater scientist--A licensed geoscientist or licensed engineer who has received a baccalaureate or postgraduate degree in the natural sciences or engineering and has sufficient training in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university programs that enable the individual to make sound professional judgments regarding groundwater monitoring, contaminant fate and transport, and corrective action.

(108) RACM--Regulated asbestos-containing material as defined in 40 Code of Federal Regulations Part 61, as amended, includes: friable asbestos material, Category I nonfriable asbestos-containing material (ACM) that has become friable; Category I nonfriable ACM that will be, or has been, subjected to sanding, grinding, cutting, or abrading; or Category II nonfriable ACM that has a high probability of becoming, or has become, crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations.

(109) Radioactive waste--Waste that requires specific licensing under Texas Health and Safety Code, Chapter 401, and the rules adopted by the commission under that law.

(110) Recyclable material--A material that has been recovered or diverted from the nonhazardous waste stream for purposes of reuse, recycling, or reclamation, a substantial portion of which is consistently used in the manufacture of products that may otherwise be produced using raw or virgin materials. Recyclable material is not solid waste. However, recyclable material may become solid waste at such time, if any, as it is abandoned or disposed of rather than recycled, whereupon it will be solid waste with respect only to the party actually abandoning or disposing of the material.

(111) Recycling--A process by which materials that have served their intended use or are scrapped, discarded, used, surplus, or obsolete are collected, separated, or processed and returned to use in the form of raw materials in the production of new products. Except for mixed municipal solid waste composting, that is, composting of the typical mixed solid waste stream generated by residential, commercial, and/or institutional sources, recycling includes the composting process if the compost material is put to beneficial use.

(112) Refuse--Same as rubbish.

(113) Registration--The act of filing information for specific solid waste management activities that do not require a permit, as determined by this chapter.

(114) Regulated hazardous waste--A solid waste that is a hazardous waste as defined in 40 Code of Federal Regulations (CFR) §261.3, and that is not excluded from regulation as a hazardous waste under 40 CFR §261.4(b), or that was not generated by a conditionally exempt small-quantity generator.

(115) Relevant point of compliance--See point of compliance.

(116) Resource recovery--The recovery of material or energy from solid waste.

(117) Resource recovery site--A solid waste processing site at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(118) Rubbish--Nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(119) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(120) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(121) Salvaging--The controlled removal of waste materials for utilization, recycling, or sale.

(122) Saturated zone--That part of the earth's crust in which all voids are filled with water.

(123) Scavenging--The uncontrolled and unauthorized removal of materials at any point in the solid waste management system.

(124) Scrap tire--Any tire that can no longer be used for its original intended purpose.

(125) Seasonal high water table--The highest measured or calculated water level in an aquifer during investigations for a permit application and/or any groundwater characterization studies at a site.

(126) Septage--The liquid and solid material pumped from a septic tank, cesspool, or similar sewage treatment system.

(127) Site--Same as facility.

(128) Site development plan--A document, prepared by the design engineer, that provides a detailed design with supporting calculations and data for the development and operation of a solid waste site.

(129) Site operating plan--A document, prepared by the design engineer in collaboration with the site operator, that provides guidance to site management and operating personnel in sufficient detail to enable them to conduct day-to-day operations throughout the life of the site in a manner consistent with the engineer's design and the commission's regulations.

(130) Site operator--The holder of, or the applicant for, a permit (or license) for a municipal solid waste site.

(131) Sludge--Any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water-supply treatment plant, or air pollution control facility, exclusive of the treated effluent from a wastewater treatment plant.

(132) Small municipal solid waste landfill--A municipal solid waste landfill at which less than 20 tons of municipal solid waste are disposed of daily based on an annual average.

(133) Solid waste--Garbage, rubbish, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the EPA under the federal Solid Waste Disposal Act, as amended by RCRA, as amended (42 United States Code, §§6901 *et seq.*).

(134) Source-separated recyclable material--Recyclable material from residential, commercial, municipal, institutional, recreational, industrial, and other community activities, that at the point of generation has been separated, collected, and transported separately from municipal solid waste, or transported in the same vehicle as municipal solid waste, but in separate containers or compartments. Source-separation does not require the recovery or separation of non-recyclable components that are integral to a recyclable product, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

(135) Special waste--Any solid waste or combination of solid wastes that because of its quantity, concentration, physical or chemical characteristics, or biological properties requires special handling and disposal to protect the human health or the environment. If improperly handled, transported, stored, processed, or disposed of or

otherwise managed, it may pose a present or potential danger to the human health or the environment. Special wastes are:

(A) hazardous waste from conditionally exempt small-quantity generators that may be exempt from full controls under §§335.401 - 335.403 and 335.405 - 335.412 of this title (relating to Household Materials Which Could Be Classified as Hazardous Wastes);

(B) Class I industrial nonhazardous waste not routinely collected with municipal solid waste;

(C) special waste from health care-related facilities (refers to certain items of medical waste);

(D) municipal wastewater treatment plant sludges, other types of domestic sewage treatment plant sludges, and water-supply treatment plant sludges;

(E) septic tank pumpings;

(F) grease and grit trap wastes;

(G) wastes from commercial or industrial wastewater treatment plants; air pollution control facilities; and tanks, drums, or containers, used for shipping or storing any material that has been listed as a hazardous constituent in 40 Code of Federal Regulations (CFR), Part 261, Appendix VIII but has not been listed as a commercial chemical product in 40 CFR §261.33(e) or (f);

(H) slaughterhouse wastes;

(I) dead animals;

(J) drugs, contaminated foods, or contaminated beverages, other than those contained in normal household waste;

(K) pesticide (insecticide, herbicide, fungicide, or rodenticide) containers;

(L) discarded materials containing asbestos;

(M) incinerator ash;

(N) soil contaminated by petroleum products, crude oils, or chemicals;

(O) used oil;

(P) light ballasts and/or small capacitors containing polychlorinated biphenyl compounds;

(Q) waste from oil, gas, and geothermal activities subject to regulation by the Railroad Commission of Texas when those wastes are to be processed, treated, or disposed of at a solid waste management facility permitted under this chapter;

(R) waste generated outside the boundaries of Texas that contains:

(i) any industrial waste;

(ii) any waste associated with oil, gas, and geothermal exploration, production, or development activities; or

(iii) any item listed as a special waste in this paragraph;

(S) any waste stream other than household or commercial garbage, refuse, or rubbish;

(T) lead acid storage batteries; and

(U) used-oil filters from internal combustion engines.

(136) Special waste from health care-related facilities--Includes animal waste, bulk human blood, blood products, body fluids, microbiological waste, pathological waste, and sharps as defined in 25 TAC §1.132 (concerning Definitions).

(137) Stabilized sludges--Those sludges processed to significantly reduce pathogens, by processes specified in 40 Code of Federal Regulations Part 257, Appendix II.

(138) Storage--The holding of solid waste for a temporary period, at the end of which the solid waste is processed, disposed of, or stored elsewhere. Facilities established as a neighborhood collection point for only nonputrescible source-separated recyclable material, as a collection point for consolidation of parking lot or street sweepings or wastes collected and received in sealed plastic bags from such activities as periodic city-wide cleanup campaigns and cleanup of rights-of-way or roadside parks, or for accumulation of used or scrap tires prior to transportation to a processing or disposal site are considered examples of storage facilities. Storage includes operation of pre-collection and post- collection as follows:

(A) pre-collection - that storage by the generator, normally on his premises, prior to initial collection;

(B) post-collection - that storage by a transporter or processor, at a processing site, while the waste is awaiting processing or transfer to another storage, disposal, or recovery facility.

(139) Storage battery--A secondary battery, so called because the conversion from chemical to electrical energy is reversible and the battery is thus rechargeable. Secondary or storage batteries contain an electrode made of sponge lead and lead dioxide, nickel-iron, nickel-cadmium, silver-zinc, or silver-cadmium. The electrolyte used is sulfuric acid. Other types of storage batteries contain lithium, sodium-liquid sulfur, or chlorine-zinc using titanium electrodes.

(140) Store--To keep, hold, accumulate, or aggregate.

(141) Structural components--Liners, leachate collections systems, final covers, run-on/run-off systems, and any other component used in the construction and operation of the municipal solid waste landfill that is necessary for protection of human health and the environment.

(142) Surface impoundment--A facility or part of a facility that is a natural topographic depression, human-made excavation, or diked area formed primarily of earthen materials (although it may be lined with human-made materials) that is designed to hold an accumulation of liquids; examples include holding, storage, settling, and aeration pits, ponds, or lagoons.

(143) Surface water--Surface water as included in water in the state.

(144) Texas Civil Statutes--Vernon's Texas Revised Civil Statutes Annotated.

(145) Transfer station--A fixed facility used for transferring solid waste from collection vehicles to long-haul vehicles (one transportation unit to another transportation unit). It is not a storage facility such as one where individual residents can dispose of their wastes in bulk storage containers that are serviced by collection vehicles.

(146) Transportation unit--A truck, trailer, open-top box, enclosed container, rail car, piggy-back trailer, ship, barge, or other transportation vehicle used to contain solid waste being transported from one geographical area to another.

(147) Transporter--A person who collects and transports solid waste; does not include a person transporting his or her household waste.

(148) Trash--Same as Rubbish.

(149) Treatment--Same as Processing.

(150) Triple rinse--To rinse a container three times using a volume of solvent capable of removing the contents equal to 10% of the volume of the container or liner for each rinse.

(151) Uncompacted waste--Any waste that is not a liquid or a sludge, has not been mechanically compacted by a collection vehicle, has not been driven over by heavy equipment prior to collection, or has not been compacted prior to collection by any type of mechanical device other than small, in-house compactor devices owned and/or operated by the generator of the waste.

(152) Unified soil classification system--The standardized system devised by the United States Army Corps of Engineers for classifying soil types.

(153) Unconfined water--Water that is not controlled or impeded in its direction or velocity.

(154) Unit--Municipal solid waste landfill unit.

(155) Unstable area--A location that is susceptible to natural or human-induced events or forces capable of impairing the integrity of some or all of the landfill structural components responsible for preventing releases from a landfill. Unstable areas can include poor foundation conditions, areas susceptible to mass movements, and karst terrains.

(156) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer; includes lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

(157) Vector--An agent, such as an insect, snake, rodent, bird, or animal capable of mechanically or biologically transferring a pathogen from one organism to another.

(158) Washout--The carrying away of solid waste by waters.

(159) Waste management unit boundary--A vertical surface located at the hydraulically downgradient limit of the unit. This vertical surface extends down into the uppermost aquifer.

(160) Waste-separation/intermediate-processing center--A facility, sometimes referred to as a materials recovery facility, to which recyclable materials arrive as source-separated materials, or where recyclable materials are separated from the municipal waste stream and processed for transport off-site for reuse, recycling, or other beneficial use.

(161) Waste-separation/recycling facility--A facility, sometimes referred to as a material recovery facility, in which recyclable materials are removed from the waste stream for transport off-site for reuse, recycling, or other beneficial use.

(162) Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or non-navigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(163) Water table--The upper surface of the zone of saturation at which water pressure is equal to atmospheric pressure, except where that surface is formed by a confining unit.

(164) Waters of the United States--All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide, with their tributaries and adjacent wetlands, interstate waters and their tributaries, including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters that are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; that are used or could be used for industrial purposes by industries in interstate commerce; and all impoundments of waters otherwise considered as navigable waters; including tributaries of and wetlands adjacent to waters identified herein.

(165) Wetlands--As defined in Chapter 307 of this title (relating to Texas Surface Water Quality Standards) and areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs, and similar areas.

(166) Yard waste--Leaves, grass clippings, yard and garden debris, and brush, including clean woody vegetative material not greater than six inches in diameter, that results from landscaping maintenance and land-clearing operations. The term does not include stumps, roots, or shrubs with intact root balls.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER E. PERMIT PROCEDURES

30 TAC §§330.51, 330.53, 330.56, 300.64

STATUTORY AUTHORITY The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; Texas Health and Safety Code, §361.024, which authorizes the commission to establish standards of operation for the management and control of solid waste; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§330.51. Permit Application for Municipal Solid Waste Facilities.

(a) Permit application. The application for a municipal solid waste facility is divided into Parts I - V. Parts I - IV of the application shall be required before the application is declared "administratively complete" in accordance with Chapter 281 of this title (relating to Applications Processing). A complete application, containing Parts I - IV,

shall be submitted before a hearing can be conducted on the technical design merits of the application. If the executive director determines that a "land-use only public hearing" as described in §330.61 of this title (relating to Land-Use Public Hearing) is appropriate, the owner or operator shall submit a partial application consisting of Parts I and II of the application. A complete application, consisting of Parts I - IV of the application, shall be submitted based upon the results of the land-use only public hearing. The owner or operator shall be required to comply with the design, construction, and operating procedures proposed in his application. Part V shall be submitted upon completion of construction of the facility. It is intended that this subchapter completely define the information needed for permit review, but the executive director may request additional data if such is reasonably required to allow a decision to be made. Applicants for Type I-AE municipal solid waste landfills (MSWLFs) are required to submit all parts of the application except for those items pertaining to but not limited to §§330.200 - 330.206 of this title (relating to Groundwater Protection Design and Operation) and §§330.230 - 330.242 of this title (relating to Groundwater Monitoring and Corrective Action). Applicants for a Type I-AE facility are exempt from §330.56(d) of this title (relating to Attachments to the Site Development Plan).

(1) Part I of the application shall consist of the information required in §305.45 of this title (relating to Contents of Application for Permit) and §330.52 of this title (relating to Technical Requirements of Part I of the Application).

(2) Part II of the application shall describe the existing conditions and character of the site and surrounding area. Part II of the application shall consist of the information contained in §330.53 of this title (relating to Technical Requirements of Part II of the Application). An applicant must submit Parts I and II of his application before a land-use public hearing is conducted in accordance with §330.61 of this title.

(3) Part III of the application shall contain most of the necessary engineering information, detailed investigative reports, the schematic designs of the facility, and the required plans. Part III shall consist of the documents required in §§330.54 - 330.56 of this title (relating to Permit Procedures).

(4) Part IV of the application shall contain the site operating plan that shall discuss how the applicant plans to conduct his daily operations at the site. Part IV shall consist of the documents required in §330.57 of this title (relating to Technical Requirements of Part IV of the Application).

(5) Part V of the application is reserved for construction documents. Construction plans and specifications shall be handled as required by §330.58 of this title (relating to Technical Requirements of Part V of the Application).

(b) Required information. The information required by this subchapter defines the basic elements for an application.

(1) All aspects of the application and design requirements must be addressed by the applicant, even if only to show why they are not applicable for that particular site.

(2) It is the responsibility of the applicant to provide the executive director data of sufficient completeness, accuracy, and clarity to provide assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners. Failure to provide complete information as required by this chapter may be cause for the executive director to return the application without further action. Submission of false information shall constitute grounds for denial of the permit.

(3) The applicant is responsible for determining and reporting to the executive director any site- specific conditions that require special design considerations.

(4) For construction in a floodplain, the following must be submitted, where applicable:

(A) approval from the governmental entity with jurisdiction under Texas Water Code, §16.236, as implemented by Chapter 301 of this title (relating to Levee Improvement Districts, District Plans of Reclamation, and Levees and Other Improvements);

(B) a floodplain development permit from the city, county, or other agency with jurisdiction over the proposed improvements;

(C) a Conditional Letter of Map Amendment (CLOMA) from The Federal Emergency Management Agency (FEMA); and

(D) a Corps of Engineers Section 404 Specification of Disposal Sites for Dredged or Fill Material for construction of all necessary improvements.

(5) The applicant shall submit demonstration of compliance with National Pollution Discharge Elimination System (NPDES) under CWA, §402, as amended.

(6) The applicant shall submit documentation of coordination with the following agencies, where applicable:

(A) Texas Commission on Environmental Quality for compliance with CWA, §208;

(B) Federal Aviation Administration, for compliance with airport location restrictions; and

(C) Texas Department of Transportation for traffic and location restrictions.

(7) The applicant shall submit wetlands determination under applicable federal, state, and local laws.

(8) The applicant shall submit Endangered Species Act compliance demonstrations under state and federal laws.

(9) The applicant shall submit a review letter from Texas Antiquities Committee.

(10) The applicant shall submit demonstration of compliance with regional solid waste plan.

(c) Number of copies. Applications shall be initially submitted in four copies. The applicant shall furnish up to 18 additional copies of the application for use by required reviewing agencies, upon request of the executive director.

(d) Preparation. Preparation of the application must conform with Texas Civil Statutes, Texas Engineering Practice Act, Article 3271a and Texas Geoscience Practice Act, Article 3271b.

(1) The responsible engineer shall seal, sign, and date each sheet of engineering plans, drawings, and the title or contents page of the application as required by Texas Engineering Practice Act, §15c, and in accordance with 22 TAC §131.166 (relating to Engineers' Seals).

(2) The responsible geoscientist shall seal, sign, and date applicable items as required by Texas Geoscience Practice Act, §6.13(b).

(3) Applications that have not been sealed shall be considered incomplete for the intended purpose and shall be returned to the applicant.

(e) Application format.

(1) Applications shall be submitted in three-ring loose-leaf binders.

(2) The narrative of the report shall be printed on 8 1/2 by 11 inches white paper. Drawings or other sheets shall be no larger than 11 by 17 inches so that they can be reproduced by standard office copy machines.

(3) All pages shall contain a page number and date.

(4) Revisions shall have the revision date and note that the sheet is revised in the header or footer of each revised sheet. The revised text shall be marked to highlight the revision.

(5) Dividers and tabs are encouraged.

(f) Application drawings.

(1) All information contained on a drawing shall be legible, even if it has been reduced. The drawings shall be 8 1/2 by 11 inches or 11 by 17 inches. Standard sized drawings (24 by 36 inches) folded to 8 1/2 by 11 inches may be submitted or required if reduction would render them illegible or difficult to interpret.

(2) If color coding is used, it should be legible and the code distinct when reproduced on black and white photocopy machines.

(3) Drawings shall be submitted at a standard engineering scale.

(4) Each drawing shall have a:

(A) dated title block;

(B) bar scale at least one-inch long;

(C) revision block;

(D) responsible engineer's seal, if required; and

(E) drawing number and a page number.

(5) Each map or plan drawing shall also have:

(A) a north arrow. Preferred orientation is to have the north arrow pointing toward the top of the page;

(B) a reference to the base map source and date if the map is based upon another map. The latest published edition of the base map should be used;

(C) a legend; and

(D) two longitudes and latitudes shall be shown on all general location maps.

(6) Match lines and section lines shall reference the drawing where the match or section is shown. Section drawings should note from where the section was taken.

§330.56. Attachments to the Site Development Plan.

(a) Attachment 1 - site layout plan.

(1) This is the basic element of the site development plan consisting of a site layout plan on a constructed map showing the outline of the units and fill sectors with appropriate notations thereon to communicate the types of wastes to be disposed of in individual sectors, the general sequence of filling operations, locations of all interior site roadways to provide access to all fill areas, locations of monitor wells, dimensions of trenches, locations of buildings, and any other graphic representations or marginal explanatory notes necessary to communicate the proposed step-by-step construction of the site. The layout should include: fencing; sequence of excavations, filling, maximum waste elevations and final cover; provisions for the maintenance of natural windbreaks, such as greenbelts, where they will improve the appearance and operation of the site; and, where appropriate, plans for screening the site from public view.

(2) A generalized design of all site entrance roads from public access roads shall be included. All designs of proposed public roadway improvements such as turning lanes, storage lanes, etc., associated with site entrances should be coordinated with the agency exercising maintenance responsibility of the public roadway involved.

(3) This plan is the basis for operational planning and budgeting, and therefore shall contain sufficient detail to provide an effective site management tool.

(b) Attachment 2 - fill cross-section.

(1) The fill cross-sections must consist of plan profiles across the site clearly showing the top of the levee, top of the proposed fill (top of the final cover), maximum elevation of proposed fill, top of the wastes, existing ground, bottom of the excavations, side slopes of trenches and fill areas, gas vents or wells, and groundwater monitoring wells, plus the initial and static levels of any water encountered.

(2) The fill cross-sections shall go through or very near the soil borings in order that the boring logs obtained from the soils report can also be shown on the profile.

(3) Large sites shall provide sufficient fill cross-sections, both latitudinally and longitudinally, so as to accurately depict the existing and proposed depths of all fill areas within the site. The plan portion shall be shown on an inset key map.

(4) Construction and design details of compacted perimeter or toe berms which are proposed in conjunction with aboveground (aerial-fill) waste disposal areas shall be included in the fill cross- sections.

(c) Attachment 3 - existing contour map. This is a constructed map showing the contours prior to any grading, excavation, and/or filling operations on the site. Appropriate vertical contour intervals shall be selected so that contours are not further apart than 100 feet as measured horizontally on the ground. Wider spacing may be used when approved by the executive director. The map should show the location and quantities of surface drainage entering, exiting, or internal to the site and the area subject to flooding by a 100-year frequency flood.

(d) Attachment 4 - geology report. This portion of the application applies to owners or operators of municipal solid waste (MSW) facilities that store, process, or dispose of MSW in landfills. If the municipal solid waste landfill (MSWLF) facility contains two or more MSWLF units, the information requested pertaining to regional geology and regional aquifers need only be provided once. The geology report shall be prepared and signed by a qualified groundwater scientist except that the reports required under paragraph (5) of this subsection shall be signed and sealed, where appropriate, as required by the Texas Engineering Practice Act. Previously prepared documents may be submitted but must be supplemented as necessary to provide the requested information. Sources and references for information must be provided. The geology report must contain the information in paragraphs (1) - (6) of this subsection.

(1) The owner or operator shall provide a discussion of the regional physiography and topography in the vicinity of the facility. The discussion shall include, at a minimum, the distance to local surface water bodies and drainage features, the slope of the land surface (direction and rate), and the maximum and minimum elevations of the facility. Any limitation of the facility due to unfavorable topography (e.g., cliffs, floodplains) shall be discussed.

(2) The owner or operator shall provide a description of the regional geology of the area. This section shall include:

(A) a geologic map of the region with text describing the stratigraphy and lithology of the map units. An appropriate section of a published map series such as the Geologic Atlas of Texas prepared by the Bureau of Economic Geology is acceptable;

(B) a description of the generalized stratigraphic column in the facility area from the base of the lowermost aquifer capable of providing usable groundwater, or from a depth of 1,000 feet, whichever is less, to the land surface. The geologic age, lithology, variations in lithology, thickness, depth, geometry, hydraulic conductivity, and depositional history of each geologic unit should be described based upon available geologic information. Regional stratigraphic cross-sections should be provided.

(3) The owner or operator shall provide a description of the geologic processes active in the vicinity of the facility. This description shall include:

(A) an identification of any faults and subsidence in the area of the facility. The information about faulting and subsidence shall include at least that required in §330.303(b) and §330.305 of this title (relating to Fault Areas and Unstable Areas, respectively);

(B) a discussion of the degree to which the facility is subject to erosion. The potential for erosion due to surface water processes such as overland flow, channeling, gullying, and fluvial processes such as meandering streams and undercut banks shall be evaluated. If the facility is located in a low-lying coastal area, historical rates of shoreline erosion shall also be provided; and

(C) an identification of wetlands located within the facility boundary.

(4) The owner or operator shall provide a description of the regional aquifers in the vicinity of the facility based upon published and open-file sources. The section shall provide:

(A) aquifer names and their association with geologic units described in paragraph (2) of this subsection;

(B) a description of the composition of the aquifer(s);

(C) a description of the hydraulic properties of the aquifer(s);

(D) information on whether the aquifers are under water table or artesian conditions;

(E) information on whether the aquifers are hydraulically connected;

(F) a regional water-table contour map or potentiometric surface map for each aquifer, if available;

(G) an estimate of the rate of groundwater flow;

(H) typical values or a range of values for total dissolved solids content of groundwater from the aquifers;

(I) identification of areas of recharge to the aquifers within five miles of the site; and

(J) the present use of groundwater withdrawn from aquifers in the vicinity of the facility. The identification, location, and aquifer of all water wells within one mile of the property boundaries of the facility shall be provided.

(5) The owner or operator shall provide the results of investigations of subsurface conditions at a particular waste management unit in the following reports.

(A) Subsurface investigation report. This report must describe all borings drilled on-site to test soils and characterize groundwater and must include a site map drawn to scale showing the surveyed locations and elevations of the borings. Boring logs must include a detailed description of materials encountered including any discontinuities such as fractures, fissures, slickensides, lenses, or seams. Geophysical logs of the boreholes may be useful in evaluating the stratigraphy. Each boring must be presented in the form of a log that contains, at a minimum, the boring number; surface elevation and location coordinates; and a columnar section with text showing the elevation of all contacts between soil and rock layers, description of each layer using the unified soil classification, color, degree of compaction, and moisture content. A key explaining the symbols used on the boring logs and the classification terminology for soil type, consistency, and structure must be provided.

(i) A sufficient number of borings shall be performed to establish subsurface stratigraphy and to determine geotechnical properties of the soils and rocks beneath the facility. Other types of samples may also be taken to provide geologic and geotechnical data. The number of borings necessary can only be determined after the general characteristics of a site are analyzed and will vary depending on the heterogeneity of subsurface materials. Locations with stratigraphic complexities such as non- uniform beds that pinch out, vary significantly in thickness, coalesce, or grade into other units, will require a significantly greater degree of subsurface investigation than areas with simple geologic frameworks.

(ii) Borings shall be sufficiently deep to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers. Borings shall penetrate the uppermost aquifer and all deeper hydraulically interconnected aquifers and be deep enough to identify the aquiclude at the lower boundary. All the borings shall be at least five feet deeper than the elevation of the deepest excavation. In addition, at least the number of borings shown on the Table of Borings shall be drilled to a depth at least 30 feet below the deepest excavation planned at the waste management unit, unless the executive director approves a different depth. If no aquifers exist within 50 feet of the elevation of the deepest excavation, at least one test hole shall be drilled to the top of the first perennial aquifer beneath the site, if sufficient data does not exist to accurately locate it. The executive director may accept data equivalent to a deep boring on the site to determine information for aquifers more than 50 feet below the site. Aquifers more than 300 feet below the lowest excavation and where the estimated travel times for constituents to the aquifer are in excess of 30 years plus the estimated life of the site need not be identified through borings.
Figure: 30 TAC §330.56(d)(5)(A)(ii) (No change.)

(iii) All borings shall be conducted in accordance with established field exploration methods. The hollow-stem auger boring method is recommended for softer materials; coring may be required for harder rocks. Other methods shall be used as necessary to obtain adequate samples for soil testing required in this paragraph. Investigation procedures shall be discussed in the report.

(iv) The boring plan, including locations and depths of all proposed borings, shall be approved by the executive director prior to initiation of the work.

(v) Installation, abandonment, and plugging of the borings shall be in accordance with the rules of the commission.

(vi) Both the number and depth of borings may be modified because of site conditions with prior approval of the executive director.

(vii) Geophysical methods, such as electrical resistivity, may be used with authorization of the executive director to reduce the number of borings that may be necessary or to provide additional information between borings.

(viii) Cross-sections must be prepared from the borings depicting the generalized strata at the facility. For small waste management units two perpendicular cross-sections will normally suffice.

(ix) A narrative that describes the investigator's interpretations of the subsurface stratigraphy based upon the field investigation shall be provided.

(B) Geotechnical report. This report shall include engineering data that describes the geotechnical properties of the subsurface soil materials and a discussion with conclusions about the suitability of the soils and strata for the uses for which they are intended. All engineering tests shall be performed in accordance with industry practice and recognized procedures such as described below. A brief discussion of engineering test procedures shall be included in the report.

(i) A laboratory report of soil characteristics shall be determined from at least one sample from each soil layer or stratum that will form the bottom and side of the proposed excavation and from those that are less than 30 feet below the lowest elevation of the proposed excavation. As many additional tests shall be performed as necessary to provide a typical profile of soil stratification within the site. No laboratory work need be performed on highly permeable soil layers such as sand or gravel. The samples shall be tested by a competent independent third-party soils laboratory.

(ii) Permeability tests shall be performed according to one of the following standards on undisturbed soil samples. Permeability tests shall be performed using tap water or .05 Normal solution of $CaSO_4$, and not distilled water, as the permeant. Those undisturbed samples that represent the sidewall of any proposed trench, pit, or excavation shall be tested for the coefficient of permeability on the sample's in-situ horizontal axis; all others shall be tested on the in-situ vertical axis. All test results shall indicate the type of tests used and the orientation of each tested sample. All calculations for the final coefficient of permeability tests result for each sample tested shall be included in the report:

(I) constant head with back pressure per Appendix VII of Corps of Engineers Manual EM1110-2-1906, "Laboratory Soils Testing;" ASTM D5084 "Saturated Porous Materials Using a Flexible Wall Permeameter";

(II) falling head per Appendix VII of Corps of Engineers Manual EM1110-2-1906, "Laboratory Soils Testing";

(III) sieve analysis for the 200, and less than 200 fraction per ASTM D1140;

(IV) Atterberg limits per ASTM D4318;

(V) moisture content per ASTM D2216.

(C) A groundwater investigation report. This report must include the following:

(i) the depth at which groundwater was encountered and records of after-equilibrium measurements in all borings. The cross-sections prepared in response to subparagraph (A)(viii) of this paragraph must be annotated to note the level at which groundwater was first encountered and the level of groundwater after equilibrium is reached or just prior to plugging, whichever is later. This water-level information must also be presented on all borings required by this paragraph and presented in a table format in the report;

(ii) records of water-level measurements in monitor wells. Historic water-level measurements made during any previous groundwater monitoring shall be presented in a table for each well;

(iii) all the information and data required in §330.231(e)(1) of this title (relating to Groundwater Monitoring Systems); and

(iv) an analysis of the most likely pathway(s) for pollutant migration in the event that the primary barrier liner system is penetrated. This must include any groundwater modeling data and results as described in §330.231(e)(2) of this title and must consider changes in groundwater flow that are expected to result from construction of the facility.

(6) The owner or operator shall provide a description of the existing or proposed monitoring system that meets the requirements of §330.231 of this title. The owner or operator shall also provide engineering drawings of a typical monitoring well and a table of data for all proposed wells that includes the following information for each well: total depth of the well; depth to groundwater; surveyed elevation of the ground surface at the well; surveyed elevation of the top of each well casing (or that point consistently used to determine depth to groundwater); depth to the top and base of the screen; and depth to the top and base of the filter pack.

(e) Attachment 5 - groundwater characterization report. A groundwater characterization study and report is required from owners and operators of proposed MSWLF units or proposed lateral expansions except for Soils and Liner Evaluation Reports and Flexible Membrane Liner Evaluation Reports covering previously permitted and approved designs. The report must contain the following information:

(1) a tabulation of all relevant groundwater monitoring data from wells on site or on adjacent MSWLF unit(s);

(2) identification of the uppermost aquifer and any lower aquifers that are hydraulically connected to it beneath the facility, including groundwater flow direction and rate, and the basis for such identification (i.e., the information obtained from hydrogeologic investigations of the facility area);

(3) on a topographic map as required under §330.52(b)(4)(C) of this title (relating to Technical Requirements of Part I of the Application), a delineation of the waste management area, the property boundary, the proposed "point of compliance" as defined under §330.200(d) of this title (relating to Design Criteria), the proposed location of groundwater monitoring wells as required under §330.231 of this title, and, to the extent possible, the information required in paragraph (2) of this subsection;

(4) a description of any plume of contamination that has entered the groundwater from the MSWLF facility at the time that the application was submitted that:

(A) delineates the extent of the plume on the topographic map required under §330.52(b)(4)(C) of this title; and

(B) identifies the concentration of each assessment constituent as defined in §330.235 of this title (relating to Assessment Monitoring Program) throughout the plume or identifies the maximum concentration of each assessment constituent in the plume;

(5) detailed plans and an engineering report describing the proposed groundwater monitoring program to be implemented to meet the requirements of §330.231 of this title;

(6) if the hazardous constituents listed in Table I of §330.241 of this title (relating to Constituents for Detection Monitoring) have not been detected in the groundwater at the time of permit application, the owner or operator shall submit sufficient information, supporting data, and analyses to establish a detection monitoring program that meets the requirements of §330.234 of this title (relating to Detection Monitoring Program). This submission must address the following items specified under §330.234 of this title:

(A) a proposed groundwater monitoring system;

(B) background values for each monitoring parameter or constituent listed in §330.241 of this title, or procedures to calculate such values; and

(C) a description of proposed sampling, analysis, and statistical comparison procedures to be utilized in evaluating groundwater monitoring data;

(7) if the presence of hazardous constituents listed in Table I of §330.241 of this title has been detected in the groundwater at the time of the permit application, the owner or operator shall submit sufficient information, supporting data, and analyses to establish an assessment monitoring program that meets the requirements of §330.235 of this title. To demonstrate compliance with §330.235 of this title, the owner or operator shall address the following items:

(A) a description of any special wastes previously handled at the MSWLF facility;

(B) a characterization of the contaminated groundwater, including concentration of assessment constituents as defined in §330.235 of this title;

(C) a list of assessment constituents as defined in §330.235 of this title for which assessment monitoring will be undertaken in accordance with §330.233 of this title (relating to Groundwater Sampling and Analysis Requirements) and §330.235 of this title;

(D) detailed plans and an engineering report describing the proposed groundwater monitoring system, in accordance with the requirements of §330.233 of this title; and

(E) a description of proposed sampling, analysis, and statistical comparison procedures to be utilized in evaluating groundwater monitoring data; and

(8) if hazardous constituents have been measured in the groundwater that exceed the concentration limits established in Table 1 of §330.241 of this title, the owner or operator shall submit sufficient information, supporting data, and analyses to establish a corrective action program that meets the requirements of §330.236 of this title (relating to Assessment of Corrective Measures) and §330.237 of this title (relating to Selection of Remedy). To demonstrate compliance with §330.236 of this title, the owner or operator shall address, at a minimum, the following items:

(A) a characterization of the contaminated groundwater, including concentrations of assessment constituents as defined in §330.235 of this title;

(B) the concentration limit for each constituent found in the groundwater;

(C) detailed plans and an engineering report describing the corrective action to be taken;

(D) a description of how the groundwater monitoring program will demonstrate the adequacy of the corrective action; and

(E) the permit may contain a schedule for submittal of the information required in subparagraphs (C) and (D) of this paragraph provided the owner or operator obtains written authorization from the executive director prior to submittal of the complete permit application.

(f) Attachment 6 - groundwater and surface water protection plan and drainage plan. These plans must reflect locations, details, and typical sections of levees, dikes, drainage channels, culverts, holding ponds, trench liners, storm sewers, leachate collection systems, or any other facilities relating to the protection of groundwater and surface water. Adequacy of provisions for safe passage of any internal or externally adjacent floodwaters should be reflected here.

(1) A drawing(s) showing the drainage areas and drainage calculations shall be provided.

(2) Cross-sections or elevations of levees should be shown tied into contours. Natural drainage patterns shall not be significantly altered.

(3) The 100-year floodplain shall be shown on this attachment.

(4) As part of the attachment, the following information and analyses must be submitted for review, as applicable.

(A) Drainage and run-off control analyses:

(i) a description of the hydrologic method and calculations used to estimate peak flow rates and run-off volumes including justification of necessary assumptions;

(ii) the 25-year rainfall intensity used for facility design including the source of the data; all other data and necessary input parameters used in conjunction with the selected hydrologic method and their sources should be documented and described;

(iii) hydraulic calculations and designs for sizing the necessary collection, drainage, and/or detention facilities shall be provided.

(iv) discussion and analyses to demonstrate that natural drainage patterns will not be significantly altered as a result of the proposed landfill development;

(v) structural designs of the collection, drainage, and/or storage facilities, and results of all field tests to ensure compatibility with soils;

(vi) a maintenance plan for ensuring the continued operation of the collection, drainage, and/or storage facilities, as designed along with the plan for restoration and repair in the event of a washout or failure; and

(vii) erosion and sedimentation control plan, including interim controls for phased development.

(B) Flood control and analyses.

(i) Identify whether the site is located within a 100-year floodplain. Indicate the source of all data for such determination and include a copy of the relevant Federal Emergency Management Agency (FEMA) flood map, if used, or the calculations and maps used where a FEMA map is not available. Information shall also be provided identifying the 100-year flood level and any other special flooding factors (e. g., wave action) that must be considered in designing, constructing, operating, or maintaining the proposed facility to withstand washout from a 100-year flood. The boundaries of the proposed landfill facility should be shown on the floodplain map.

(ii) If the site is located within the 100-year floodplain, the applicant shall provide information detailing the specific

flooding levels and other events (e.g., design hurricane projected by Corps of Engineers) that impact the flood protection of the facility. Data should be that required by §§301.33 - 301.36 of this title (relating to Approval of Levees and Other Improvements).

(iii) No solid waste disposal and treatment operations shall be permitted in areas that are located in a floodway as defined by FEMA.

(g) Attachment 7 - final contour map. This is a constructed map showing the final contour of the entire landfill to include internal drainage and side slopes plus accommodation of surface drainage entering and departing the completed fill area plus areas subject to flooding due to a 100-year frequency flood. Cross-sections shall be provided.

(h) Attachment 8 - cost estimate for closure and post-closure care. The applicant shall submit a cost estimate for closure and post-closure care costs in accordance with Subchapter K of this chapter (relating to Closure, Post-Closure, and Corrective Action).

(i) Attachment 9 - Applicant's statement. The applicant, or the authorized representative empowered to make commitments for the applicant, shall provide a statement that he is familiar with the site development plan and is aware of all commitments represented in the plan, that he is also familiar with all pertinent requirements in this chapter, and that he agrees to develop and operate the site in accordance with the plan, the regulations, and any permit special provisions that may be imposed.

(j) Attachment 10 - soil and liner quality control plan. The soil and liner quality control plan must be prepared in accordance with §§330.200 - 330.206 of this title (relating to Groundwater Protection Design and Operation).

(k) Attachment 11 - groundwater sampling and analysis plan. The groundwater sampling and analysis plan must be prepared in accordance with §§330.230, 330.231, and 330.233 - 330.242 of this title (relating to Groundwater Monitoring and Corrective Action) or §330.239 of this title (relating to Groundwater Monitoring at Type IV Landfills).

(l) Attachment 12 - final closure plan. The final closure plan shall be prepared in accordance with §§330.250 - 330.256 of this title (relating to Closure and Post-Closure).

(m) Attachment 13 - post-closure care plan. The post-closure care plan shall be prepared in accordance with §§330.250 - 330.256 of this title (relating to Closure and Post-Closure).

(n) Attachment 14 - landfill gas management plan.

(1) Owners or operators of all MSWLF units shall ensure that:

(A) the concentration of methane gas generated by the facility does not exceed 25% of the lower explosive limit for methane in facility structures (excluding gas control or recovery system components); and

(B) the concentration of methane gas does not exceed the lower explosive limit for methane at the facility property boundary. For purposes of this section, "lower explosive limit" means the lowest percent by volume of a mixture of explosive gases in air that will propagate a flame at 25 degrees Celsius and atmospheric pressure.

(2) Owners or operators of all MSWLF units shall implement a routine methane monitoring program to ensure that the standards of paragraph (1) of this subsection are met.

(A) The type and frequency of monitoring shall be determined based on the following factors.

(i) soil conditions;

(ii) the hydrogeologic conditions surrounding the facility;

(iii) the hydraulic conditions surrounding the facility;

(iv) the location of facility structures and property boundaries; and

(v) the location of any utility lines or pipelines that cross the MSWLF facility.

(B) The minimum frequency of monitoring shall be quarterly.

(3) If methane gas levels exceeding the limits specified in paragraph (1) of this subsection are detected, the owner or operator shall:

(A) immediately take all necessary steps to ensure protection of human health and notify the executive director, local and county officials, emergency officials, and the public;

(B) within seven days of detection, place in the operating record the methane gas levels detected and a description of the steps taken to protect human health; and

(C) within 60 days of detection, implement a remediation plan for the methane gas releases, place a copy of the plan in the operating record, provide a copy to the executive director and notify the executive director that the plan has been implemented. The plan shall describe the nature and extent of the problem and the proposed remedy. After review, the executive director may require additional remedial measures.

(4) The executive director may establish alternative schedules for demonstrating compliance with paragraphs (2) and (3) of this subsection.

(5) The gas monitoring and control program shall continue for a period of thirty years after the final closure of the facility or until the owner or operator receives written authorization to reduce the program. Authorization to reduce gas monitoring and control shall be based on a demonstration by the owner or operator that there is no potential for gas migration beyond the property boundary or into on- site structures. Demonstration of this proposal shall be supported by data collected and additional studies as required.

(6) Gas monitoring and control systems shall be modified as needed to reflect changing on-site and adjacent land uses. Post-closure land use at the site shall not interfere with the function of gas monitoring and control systems. Any underground utility trenches that cross the MSWLF facility boundary shall be vented and monitored regularly.

(7) A landfill gas management plan shall be prepared that includes the following:

(A) a description of how landfill gases will be managed and controlled;

(B) a description of the proposed system(s), including installation procedures and time lines for installation, monitoring procedures, and procedures to be used during maintenance; and

(C) a backup plan to be used if the main system breaks down or becomes ineffective.

(8) Perimeter monitoring network shall be installed in accordance with the following provisions:

(A) initial monitoring at small MSWLFs and larger MSWLFs that have no habitable structures within 3,000 feet of the waste placement boundary may consist of perimeter subsurface monitoring around the perimeter of the site using portable equipment and probes. If test results show the presence of methane gas above 10% of the lower explosive limit, a permanent monitoring system shall be installed; and

(B) permanent monitoring systems shall be installed on all other MSWLFs. Technical guidance on monitoring systems may be issued by the executive director.

(9) The monitoring network design shall include provisions for monitoring on-site structures, including, but not limited to, buildings, subsurface vaults, utilities, or any other areas where potential gas buildup would be of concern.

(10) All monitoring probes and on-site structures shall be sampled for methane during the monitoring period. Sampling for specified trace gases may be required by the executive director when there is a possibility of acute or chronic exposure due to carcinogenic or toxic compounds.

(11) Monitoring frequency shall be determined as follows.

(A) As a minimum, quarterly monitoring is required. The executive director may require more frequent monitoring based upon the factors listed in this section. When more frequent monitoring is necessary, the executive director shall notify the owner or operator.

(B) More frequent monitoring shall also be required at those locations where results of monitoring indicate that landfill gas migration is occurring or is accumulating in structures.

(o) Attachment 15 - leachate and contaminated water plan.

(1) The plan shall provide the details of the storage, collection, treatment and disposal of the contaminated water, leachate and/or gas condensate from the leachate collection system and/or the gas monitoring and collection system, where used. Contaminated water is water which has come into contact with waste, leachate or gas condensate. This plan shall include the following information:

(A) estimated rate of leachate removal;

(B) capacity of sumps;

(C) pipe material and strength;

(D) pipe network spacing and grading;

(E) collection sump materials and strength;

(F) drainage media specifications and performance; and

(G) demonstration that pipes and perforations will be resistant to clogging and can be cleaned or rehabilitated.

(2) Leachate and gas condensate may be disposed of in a MSWLF unit that is designed and constructed with a composite liner system and a leachate collection system that meets the requirements of §330.200(a)(2) of this title (relating to Design Criteria). Contaminated surface water and groundwater may not be placed in or on the MSWLF unit.

(3) Leachate, gas condensate, contaminated surface water, and contaminated groundwater shall be disposed of at an authorized facility or as authorized by a National Pollutant Discharge Elimination System permit.

(4) On-site collection ponds and impoundments for contaminated water shall be lined with an approved liner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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SUBCHAPTER I. GROUNDWATER MONITORING AND CORRECTIVE ACTION

30 TAC §§330.230, 330.231, 330.235, 330.238, 330.242

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; Texas Health and Safety Code, §361.024, which authorizes the commission to establish standards of operation for the management and control of solid waste; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§330.238. Implementation of the Corrective Action Program.

(a) Based on the schedule established under §330.237(d) of this title (relating to Selection of Remedy) for initiation and completion of remedial activities, the owner or operator shall:

(1) establish and implement a corrective action groundwater monitoring program that:

(A) at least meets the requirements of an assessment monitoring program under §330.235 of this title (relating to Assessment Monitoring Program);

(B) indicates the effectiveness of the corrective action remedy; and

(C) demonstrates compliance with groundwater protection standards under subsection (e) of this section;

(2) implement the corrective action remedy selected under §330.237 of this title; and

(3) take any interim measures necessary to ensure the protection of human health and the environment. Interim measures should, to the greatest extent practicable, be consistent with the objectives of and contribute to the performance of any remedy that may be required under §330.237 of this title. The following factors shall be considered by an owner or operator in determining if interim measures are necessary:

(A) time required to develop and implement a final remedy;

(B) actual or potential exposure of nearby populations or environmental receptors to hazardous constituents;

(C) actual or potential contamination of drinking-water supplies or sensitive ecosystems;

(D) further degradation of the groundwater that may occur if remedial action is not initiated expeditiously;

(E) weather conditions that may cause hazardous constituents to migrate or be released;

(F) risks of fire or explosion, or potential for exposure to hazardous constituents as a result of an accident or failure of a container or handling system; and

(G) other situations that may pose threats to human health and the environment.

(b) An owner or operator may determine, based on information developed after implementation of the remedy has begun or other information, that compliance with requirements of §330.237(b) of this title are not being achieved through the remedy selected. In such cases, the owner or operator shall, with approval of the executive director, implement other methods or techniques that could practicably achieve compliance with the requirements unless the owner or operator makes the determination under subsection (c) of this section and if it is approved by the executive director. Failure to obtain approval from the executive director for the other methods and techniques does not relieve the owner or operator of the burden to implement an acceptable remedy.

(c) If the owner or operator determines that compliance with requirements under §330.237(b) of this title cannot be practically achieved with any currently available methods, the owner or operator shall:

(1) present to the executive director certification by a qualified groundwater scientist that compliance with requirements under §330.237(b) of this title cannot be practically achieved with any currently available methods;

(2) implement alternate measures, with the approval of the executive director, to control exposure of humans or the environment to residual contamination, as necessary to protect human health and the environment;

(3) implement alternate measures, with the approval of the executive director, for control of the sources of contamination, or for removal or decontamination of equipment, units, devices, or structures that are technically practicable and consistent with the overall objective of the remedy; and

(4) place a copy of all approved alternate measures in the operating record.

(d) All solid wastes that are managed in accordance with a remedy required under §330.237 of this title, or an interim measure required under subsection (a)(3) of this section, shall be managed in a manner that is protective of human health and the environment and that complies with applicable RCRA requirements.

(e) Remedies selected under §330.237 of this title shall be considered complete when:

(1) the owner or operator complies with the groundwater protection standards established under §330.235(h) or (i) of this title at all points within the plume of contamination that lies within or beyond the groundwater monitoring system established under §330.231(a) of this title (relating to Groundwater Monitoring Systems);

(2) compliance with the groundwater protection standards established under §330.235(h) or (i) of this title has been achieved by demonstrating that concentrations of assessment constituents have not exceeded the groundwater protection standards for a period of three consecutive years, using the statistical procedures and performance standards in §330.233(g) and (h) of this title (relating to Groundwater Sampling and Analysis Requirements). The executive director may specify an alternative length of time during which the owner or operator shall demonstrate that concentrations of assessment constituents have not exceeded the groundwater protection standards. The alternative length of time shall be based on:

(A) extent and concentration of the release;

(B) behavior characteristics of the hazardous constituents in the groundwater;

(C) accuracy of monitoring or modeling techniques, including any seasonal, meteorological, or other environmental variabilities that may affect the accuracy; and

(D) characteristics of the groundwater; and

(3) all actions required to complete the remedy have been satisfied.

(f) Within 15 days of completion of the remedy, the owner or operator shall submit to the executive director and also place in the operating record a certification by a qualified groundwater scientist that the remedy has been completed in compliance with the requirements of subsection (e) of this section.

(g) Upon submittal of satisfactory certification of the completion of the corrective action remedy, the executive director may release the owner or operator from the requirements for financial assurance for corrective action under §330.284 of this title (relating to Corrective Action for Landfills).

§330.242. Monitor-Well Construction Specifications.

(a) The following specifications must be used for the installation of groundwater monitoring wells at municipal solid waste landfills. Equivalent alternatives to these specifications may be used if prior written approval is obtained in advance from the executive director.

(1) Drilling.

(A) Monitoring wells must be drilled by a Texas-licensed driller who is qualified to drill and install monitoring wells. The installation and development shall be supervised by a licensed professional geoscientist or engineer who is familiar with the geology of the area.

(B) The well shall be drilled by a method that will allow installation of the casing, screen, etc., and that will not introduce contaminants into the borehole or casing. Drilling techniques used for boring shall take into account the materials to be drilled, depth to groundwater, total depth of the hole, adequate soil sampling, and other such factors that affect the selection of the drilling method. If any fluids are necessary in drilling or installation, then clean, treated city water shall be used; other fluids must be approved in writing by the executive director before use. If city water is used, a current chemical analysis of the city water shall be provided with the monitor-well report.

(C) The diameter of the boring shall be at least four inches larger than the diameter of the casing. When the boring is in hard rock, a smaller annulus may be approved by the executive director.

(D) During drilling of the monitoring well, a log of the boring shall be made by a licensed professional geoscientist or engineer who is familiar with the geology of the area.

(2) Casing, screen, filter pack, and seals.

(A) The well casing shall be: two to four inches in diameter; National Science Foundation-certified polyvinyl chloride (PVC) Schedule 40 or 80 pipe, flush-thread, screw joint (no glue or solvents); polytetrafluorethylene (PTFE, such as Teflon) tape or O-rings in the joints; no collar couplings. The top of the casing shall be at least two feet above ground level. Where high levels of volatile organic compounds or corrosive compounds are anticipated, stainless steel or PTFE casing and screen may be used, subject to approval by the executive director. Four-inch diameter casing is recommended because it allows larger volume samples to be obtained and provides easier access for development, pumps, and repairs. The casing shall be cleaned and packaged at the place of manufacture; the packaging shall include a PVC wrapping on each section of casing to keep it from being contaminated prior to installation. The casing shall be free of ink, labels, or other markings. The casing (and screen) shall be centered in the hole to allow installation of a good filter pack and annular seal, using appropriately placed centralizers. The top of the casing shall be protected by a threaded or slip-on top cap or by a sealing cap or screw-plug seal inserted into the top of the casing. The cap shall be vented to prevent buildup of methane or other gases and shall be designed to prevent moisture from entering the well.

(B) The screen shall be compatible with the casing and should generally be of the same material. The screen shall not involve the use of any glues or solvents for construction. A wire-wound screen is recommended to provide maximum inflow area. Field-cut slots are not permitted for well screen. Filter cloth shall not be used. A blank-pipe sediment trap, typically one to two feet, should be installed below the screen. A bottom cap is typically placed on the bottom of the sediment trap. The sediment trap shall not extend through the lower confining layer of the water-bearing zone being tested. Screen sterilization methods are the same as those for casing. Selection of the size of the screen opening should be done by a person experienced with such work and shall include consideration of the distribution of particle sizes both in the water-bearing zone and in the filter pack surrounding the screen. The screen opening shall not be larger than the smallest fraction of the filter pack.

(C) The filter pack, placed between the screen and the well bore, shall consist of pre-packaged, inert, clean silica sand or glass beads; it shall extend from one to four feet above the top of the screen. Open stockpile sources of sand or gravel are not permitted. The filter pack usually has a 30% finer grain size that is about four to ten times larger than the 30% finer grain size of the water-bearing zone; the filter pack should have a uniformity coefficient less than 2.5. The filter pack should be placed with a tremie pipe to ensure that the material completely surrounds the screen and casing without bridging. The tremie pipe shall be steam cleaned prior to the first well and before each subsequent well.

(D) The annular seal shall be placed on top of the filter pack and shall be at least two feet thick. It should be placed in the zone of saturation to maintain hydration. The seal should be composed of coarse-grain sodium bentonite, coarse-grit sodium bentonite, or bentonite grout. Special care should be taken to ensure that fine material or grout does not plug the underlying filter pack. Placement of a few inches of pre-packaged clean fine sand on top of the filter pack will help to prevent migration of the annular seal material into the filter pack. The seal should be placed on top of the filter pack with a steam-cleaned tremie pipe to ensure good distribution and should be tamped with a steam-cleaned rod to determine that the seal is thick enough. The bentonite shall be hydrated with clean water prior to any further activities on the well and left to stand until hydration is complete (eight to 12 hours, depending on the grain size of the bentonite). If a bentonite-grout (without cement) casing seal is used in the well bore, then it may replace the annular seal described in this paragraph.

(E) A casing seal shall be placed on top of the annular seal to prevent fluids and contaminants from entering the borehole from the surface. The casing seal shall consist of a commercial bentonite grout or a cement-bentonite mixture. Drilling spoil, cuttings, or other native materials are not permitted for use as a casing seal. Quick-setting cements are not permitted for use because contaminants may leach from them into the groundwater. The top of the casing seal shall be between five and two feet from the surface.

(3) Concrete pad. High-quality structural-type concrete shall be placed from the top of the casing seal (two to five feet below the surface) continuously to the top of the ground to form a pad at the surface. This formed surface pad shall be at least six inches thick and not less than four (preferably six) feet square or five (preferably six) feet in diameter. The pad shall contain sufficient reinforcing steel to ensure its structural integrity in the event that soil support is lost. The top of the pad shall slope away from the well bore to the edges to prevent ponding of water around the casing or collar.

(4) Protective collar. A steel protective pipe collar shall be placed around the casing "stickup" to protect it from damage and unwanted entry. The collar shall be set at least one foot into the surface pad during its construction and should extend at least three inches above the top of the well casing (and top cap, if present). The top of the collar shall have a lockable hinged top flap or cover. A sturdy lock shall be installed, maintained in working order, and kept locked when the well is not being bailed/purged or sampled. The well number or other designation shall be marked permanently on the protective steel collar; it is useful to mark the total depth of the well and its elevation on the collar.

(5) Protective barrier. Where monitoring wells are likely to be damaged by moving equipment or are located in heavily traveled areas, a protective barrier shall be installed. A typical barrier is three or four six- to 12-inch diameter pipes set in concrete just off the protective pad. The pipes can be joined by pipes welded between them, but consideration must be given to well access for sampling and other activities. Separation of such a pipe barrier from the pad means that the barrier can be damaged without risk to the pad and well. Other types of barriers may be approved by the executive director.

(b) Unusual conditions. Where monitoring wells are installed in unusual conditions, all aspects of the installation shall be approved in writing in advance by the executive director. Such aspects include, for example, the use of cellar-type enclosures for the top-well equipment or multiple completions in a single hole.

(c) Development. After a monitoring well is installed, it shall be developed to remove artifacts of drilling (clay films, bentonite pellets in the casing, etc.) and to open the water-bearing zone for maximum flow into the well. Development should continue until all of the water used or affected during drilling activities has been removed and field measurements of pH, specific conductance, and temperature have stabilized. Failure to develop a well properly may mean that it is not properly monitoring the water-bearing zone or may not yield adequate water for sampling even though the water-bearing zone is prolific.

(d) Location and elevation. Upon completion of a monitoring well, the location of the well and all appropriate elevations associated with the top-well equipment shall be surveyed by a registered professional surveyor. The elevation shall be surveyed to the nearest 0.01 foot above mean sea level (with year of the sea-level datum shown). The point on the well casing for which the elevation was determined shall be permanently marked on the casing. The location shall be given in terms of the latitude and longitude at least to the nearest tenth of a second or shall be accurately located with respect to the landfill grid

system described in §330.55(a)(10)(F) of this title (relating to Site Development Plan).

(e) Reporting. Monitoring well installation and construction details must be submitted on forms available from the commission and must be completed and submitted within 30 days of well completion. A copy of the detailed geologic log of the boring, any particle size or other sample data from the well, and a site map drawn to scale showing the location of all monitoring wells must be submitted to the executive director at the same time. The licensed driller should be familiar with the forms required by other agencies; a copy of those forms must also be submitted to the commission.

(f) Damaged wells. Any monitoring well that is damaged to the extent that it is no longer suitable for sampling shall be reported to the executive director who may make a determination about whether to repair or replace the well.

(g) Plugging and abandonment. Any monitoring well that is no longer used shall be properly abandoned and plugged in accordance with 16 TAC §76.702 (relating to Responsibilities of the Licensee and Landowner Well Drilling, Completion, Capping, and Plugging) and §76.1004 (relating to Technical Requirements Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones). No abandonment shall take place without prior authorization in writing by the executive director.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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SUBCHAPTER L. LOCATION RESTRICTIONS

30 TAC §§330.303 - 330.305

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; Texas Health and Safety Code, §361.024, which authorizes the commission to establish standards of operation for the management and control of solid waste; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER N. LANDFILL MINING

30 TAC §330.415, §330.416

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; Texas Health and Safety Code, §361.024, which authorizes the commission to establish standards of operation for the management and control of solid waste; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§330.416. Registration Application Preparation.

(a) General instruction and title page. To assist the executive director in evaluating the technical merits of a landfill mining facility, a site development plan shall be prepared and submitted to the commission along with a Registration Application Form. The site development plan shall be sealed by a licensed professional engineer in accordance with the provisions of 22 TAC §131.166 (relating to Engineers' Seals). All submittals must be in a complete final form. The site development plan must contain all of the information specified in this section. A title page must show the name of the project, the county (and city if applicable) in which the proposed project is located, the name of the applicant, the name of the engineer, the date the application was prepared, and the latest date the application was revised.

(b) Table of contents. A table of contents shall be included which lists the main sections of the plan, any requested variances and includes page numbers.

(c) Engineer's appointment. An engineer's appointment shall be included which consists of a letter from the applicant to the executive director identifying the consulting engineering firm responsible for the submission of the plan, specifications and any other technical data to be evaluated by the commission regarding the project. The notice of appointment shall identify by name both the applicant's consulting and the individual engineer of record. Include the mailing address, phone number and facsimile (FAX) number of the engineer.

(d) Construction plans and specifications. Those applications receiving authorization shall be required to prepare and maintain Construction Plans and Specifications, and Record Documents.

(1) Construction Plans and Specifications of the proposed or modified facility shall be prepared and one copy maintained at the facility at all times during construction.

(2) After completion of a construction phase, a record document set of construction plans and specifications shall prepared and maintained at the facility and/or at the owner or operator's main office. These plans shall be made available for inspection by the commission or other interested parties.

(3) Final Construction Plans and Specifications are not required for authorization.

(e) Applicants responsibilities.

(1) All aspects of the application must be addressed by the applicant, even if only to show why they are not applicable for that particular site.

(2) It is the responsibility of the applicant to provide the executive director data of sufficient completeness, accuracy, and clarity to provide assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners. Failure to provide complete information as required by this chapter may be cause for the executive director to return the application without further action. Submission of false information shall constitute grounds for denial.

(3) The applicant is responsible for determining and reporting to the executive director any site- specific conditions that require special design considerations.

(f) Soil boring plan approval. The applicant is responsible for submitting to the executive director a soil boring plan that conforms to the requirements found in the applicable subchapter. The soil boring plan shall be approved by the executive director prior to initiation of the work.

(g) Permanent site benchmark. A permanent benchmark must be established at the site in an area of the site that is readily accessible. This benchmark must be a bronze or other suitable metal survey marker set in concrete at a sufficient depth to retain a stable and distinctive location and be of sufficient size to withstand the deteriorating forces of nature to best achieve this goal. The benchmark elevation and survey date must be stamped on it. The benchmark elevation must be surveyed from a known National Geodetic Survey benchmark or other compatible and comparable benchmark. The location and elevation of the reference benchmark and the permanent benchmark must be identified on a map and must be included in the site development plan. Horizontal monumentation must be in accordance with 22 TAC §663.15 (relating to Precision) of the Texas Board of Professional Land Surveying rules. Vertical control precision must be ±0.1 feet relative to the elevation of the benchmark of origin.

(h) Application considerations. The application for a municipal solid waste registration shall be organized in the order of the rules of the subchapter and in conformance with the following requirements.

(1) Preparation. Preparation of the application shall conform with the Texas Civil Statutes, Engineering Practice Act, Article 3271a.

(A) The responsible engineer shall affix his seal, sign his name, place the date of execution and state the intended purpose on each sheet of engineering plans, drawings, maps, calculations, computer models, cost estimates, and on the title or contents page of the application as required by the Texas Engineering Practice Act.

(B) Applications that have not been signed and sealed shall be considered incomplete for the intended purpose and shall be returned to the applicant.

(2) Application document.

(A) Applications shall be submitted in three-ring loose-leaf binders.

(B) The narrative of the report shall be printed on 8 1/2 by 11 inches white paper.

(C) All pages shall contain a page number and date.

(D) During technical review revisions shall have the revision date and note that the sheet is revised in the header or footer of each revised sheet. The cover sheet to the application shall note all revision dates. The revised text shall be marked to highlight the revision.

(E) Dividers and tabs are encouraged.

(F) The application shall be organized in the format directed by these rules.

(G) Applications shall be initially submitted in three copies. The applicant shall furnish additional copies of the application for use by required reviewing agencies, on request of the executive director.

(i) Application drawings.

(1) All information contained on a drawing shall be legible, even if it has been reduced. The drawings shall be 8 1/2 by 11 inches or 11 by 17 inches. Standard sized drawings (24 by 36 inches) folded to 8 1/2 by 11 inches may be submitted or required if reduction would render them illegible or difficult to interpret.

(2) If color coding is used, it should be legible and the code distinct when reproduced on black and white photocopy machines.

(3) Drawings shall be submitted at a standard engineering scale.

(4) Each map or plan drawing shall have:

(A) a dated title block;

(B) a bar scale at least one inch long;

(C) a revision block;

(D) the responsible engineer's signature and seal with intended purpose, if required;

(E) the drawing number and a page number;

(F) a north arrow. Preferred orientation is to have the north arrow pointing toward the top of the page;

(G) a reference to the base map source and date if the map is based on another map. The latest published edition of the base map should be used;

(H) a legend;

(I) two longitudes and two latitudes showing on all general location maps;

(J) the boundary of the site; and

(K) match lines and section lines which shall reference the drawing where the match or section is shown. Section drawings should note from where the section was taken.

(j) Application format.

(1) General information. The first part of the application, Part A, is designed to provide information that is required regardless of the type of site involved. All items required by this section shall be submitted.

(2) Title page. The title page shall show the name of the project, the municipal solid waste registration application number if known, the name of the applicant, the location by city and county, the date of preparation and, if appropriate, the number and date of the revision. It shall be signed and sealed as required by the Texas Engineering Practice Act.

(3) Table of contents. The table of contents shall list and give the page numbers for the main sections of the application.

(4) Part A Application Form. The Part A Application Form shall be completed, signed by the applicant, and notarized on a form provided by the agency.

(k) Land use. To assist the executive director in evaluating the impact of the facility on the surrounding area, the applicant shall provide the following:

(1) a description of the zoning, if any, at the facility and within one mile of the facility. If the facility requires approval as a nonconforming use or a special use permit from the local government having jurisdiction, a copy of such approval shall be submitted with the application;

(2) a description of the character of the surrounding land uses within one mile of the proposed facility;

(3) proximity to residences and other uses (e.g. schools, churches, cemeteries, historic structures, historic sites, archaeologically significant sites, sites having exceptional aesthetic quality, parks, recreational sites, recreational facilities, licensed day care etc.). Give the approximate number of residences and business establishments within one mile of the proposed facility including the distances and directions to the nearest residences and businesses;

(4) a discussion that shows the facility is compatible with the surrounding land uses; and

(5) a constructed land use map showing the land use, zoning, residences, businesses, schools, churches, cemeteries, historic structures, historic sites, archaeologically significant sites, sites having exceptional aesthetic quality, licensed day care centers, parks, recreational sites and recreational facilities within one mile of the facility and wells within 500 feet of the facility.

(l) Access. To assist the executive director in evaluating the impact of the facility on the surrounding roadway system, the applicant shall provide the following:

(1) data on the roadways, within one mile of the facility, used to access the facility. The data shall include dimensions, surfacing, general condition, capacity and load limits;

(2) data on the volume of vehicular traffic on access roads within one mile of the proposed facility. The applicant shall include both existing and projected traffic during the life of the facility (for projected include both traffic generated by the facility and anticipated increase without the facility);

(3) an analysis of the impact the facility will have on the area roadway system, including a discussion on any mitigating measures (turning lanes, roadway improvements, intersection improvements, etc.) proposed with the project; and

(4) an access roadway map showing all area roadways within a mile of the facility. The data and analysis required in paragraphs (1) - (3) of this subsection must be keyed to this map.

(m) Site plans. To assist the executive director in evaluating the impact of the facility on the environment, public safety, and public health, the applicant shall provide the following.

(1) Surface water protection plan. The surface water protection plan shall be prepared by a licensed professional engineer. At a minimum the applicant shall provide all of the following.

(A) A design for a run-on control system capable of preventing flow onto the facility and into active excavation areas during the peak discharge from at least a 25-year, 24-hour rainfall event.

(B) A design for a run-off management system to collect and control at least the peak discharge from the facility generated by a 25-year 24-hour rainfall event.

(C) A design for a contaminated water collection system to collect and contain all leachate. Leachate shall not be used in any of the facility processes.

(D) Drainage calculations as follows.

(i) Calculations for areas of 200 acres or less shall follow the rational method as specified in the Texas Department of Transportation Bridge Division Hydraulic Manual.

(ii) Calculations for discharges from areas greater than 200 acres shall be computed by using USGS/DHT hydraulic equations compiled by the United States Geological Survey and the Texas Department of Transportation Bridge Division Hydraulic Manual, the HEC-1 and HEC-2 computer programs developed through the Hydrologic Engineering Center of the United States Army Corps of Engineers, or an equivalent or better method approved by the executive director.

(iii) Calculations for sizing containment facilities for leachate shall be shown to be determined based on the facilities proposed leachate disposal method.

(iv) Temporary and permanent erosion control measures shall be discussed.

(v) Drainage Maps and Drainage Plans shall be provided as follows:

(I) an off-site topographic drainage map showing all areas which contribute to the facilities run-on. The map shall delineate the drainage basins and sub-basins, show the direction of flow, time of concentration, basin area, rainfall intensity and flow rate. This map shall also show all creeks, rivers, intermittent streams, lakes, bayous, bays, estuaries, arroyos, and other surface waters in the state. All calculations shall be provided.

(II) a pre-construction on-site drainage map. The map shall delineate the drainage basins and sub- basins, show the direction of flow, time of concentration, basin area, rainfall intensity and flow rate. All calculations shall be provided.

(III) a post-construction on-site drainage map. The map shall delineate the drainage basins and sub- basins, show the direction of flow, time of concentration, basin area, rainfall intensity and flow rate. All calculations shall be provided.

(IV) a drainage facilities map. The map shall show all proposed drainage facilities (ditches, ponds, piping, inlets, outfalls, structures, etc.) and design parameters (velocities, cross-section areas, grades, flowline elevations, flow rates, etc.). Complete cross sections of all ditches and ponds shall be included.

(V) a profile drawing. The drawing shall include profiles of all ditches and pipes. Profiles shall include top of bank, flowline, hydraulic grade flowrate, velocities, and existing groundline. Ditches and swales shall have a minimum of one foot of freeboard.

(VI) a floodplain and wetlands map. The map shall show the location and lateral extent of all floodplains and wetlands on the site and on lands within 500 feet of the site.

(VII) an erosion control map and sedimentation control plan which indicates placement of erosion control features on the site.

(E) The test pit evaluation report shall be prepared by an engineer. Prior approval of a test pit plan must be obtained from

the executive director before excavation of test pits including location and depth of all test pits. The applicant shall include a discussion and information on the following:

(i) a description of the characteristics of waste observed in test pits excavated on the site to include the percent of paper, plastics, ferrous metal, other metal, glass, other constituents, and soil fraction by weight.

(ii) test pits shall extend four feet beneath the waste or to a depth authorized by the executive director and information submitted shall include a Toxicity Characteristic Leaching Procedure (TCLP) of the soil to characterize the soil beneath the site. Liners if present shall not be disrupted.

(iii) a TCLP of each representative type of waste excavated must be included in the report. Additionally, waste excavated from each test pit must be analyzed for asbestos and polychlorinated biphenyl. Consideration should be given to analysis of waste material from each test pit for hazardous waste constituents.

(iv) a sufficient number of test pits shall be performed to establish the properties of the waste. The number of test pits shall be three for a site of five acres or less. For sites larger than five acres the required number of test pits shall be three pits plus one for every five acres or fraction thereof. The number of test pits shall be approved by the executive director prior to making the pits. The test pits should be sufficiently large to provide representative information.

(v) all test pits where waste is removed shall be backfilled with clean CH or CL clay. The excavation shall be backfilled to exceed the existing grade and provide positive drainage.

(vi) the applicant shall prepare a cross-section drawing using the information from the test pits to depict the top and bottom elevations of the landfill.

(vii) the applicant shall include a plan view map depicting the location and extent (vertical and lateral) of the waste unit and proposed extent of mining/recovery operations. In areas with liners, mining operations should not extend below the top of the protective cover of the liner. In areas where no liner exists, excavation operations may extend below the waste.

(viii) as a part of the test pit evaluation report, historical records of landfill operations, where available, shall be evaluated to determine such things as hazardous waste potential, receipt of special waste, types of waste received, special waste disposal areas, construction and demolition material disposal areas, methane and leachate records, age, volume, and disposal methods, existence of liners, gas collection systems, and leachate collection systems.

(ix) all waste removed in test pit evaluation must be disposed of in a permitted landfill.

(F) In cases where a geologic/hydrogeologic report is determined to be needed by the executive director, the geologic/hydrogeologic report shall be prepared and signed by a licensed professional engineer or geoscientist. If determined to be needed by the executive director, the applicant shall include discussion and information on all of the following:

(i) a description of the regional geology of the area. This section must include:

(I) a geologic map of the region with text describing the stratigraphy and lithology of the map units. An appropriate section of a published map series such as the Geologic Atlas of Texas prepared by the Bureau of Economic Geology is acceptable;

(II) a description of the generalized stratigraphic column in the facility area from the base of the lowermost aquifer capable of providing usable groundwater, or from a depth of 1,000 feet, whichever is less, to the land surface. The geologic age, lithology, variation in lithology, thickness, depth geometry, hydraulic conductivity, and depositional history of each geologic unit should be described based upon available geologic information.

(ii) a description of the geologic processes active in the vicinity of the facility. This description shall include an identification of any faults and/or subsidence in the area of the facility.

(iii) a description of the regional aquifers in the vicinity of the facility based upon published and open- file sources. The section must provide:

(I) aquifer names and their association with geologic units described in clause (ii) of this subparagraph;

(II) a description of the composition of the aquifer(s);

(III) a description of the hydraulic properties of the aquifer(s);

(IV) information on whether the aquifers are under water table or artesian conditions;

(V) information on whether the aquifers are hydraulically connected;

(VI) a regional water-table contour map or potentiometric surface map for each aquifer, if available;

(VII) an estimate of the rate of groundwater flow;

(VIII) typical values or a range of values for total dissolved solids content of groundwater from the aquifers;

(IX) identification of areas of recharge to the aquifers within five miles of the site; and

(X) the present use of groundwater withdrawn from aquifers in the vicinity of the facility. The identification, location, and aquifer of all water wells within one mile of the property boundaries of the facility must be provided.

(iv) a subsurface investigation report. If determined to be needed by the executive director, the subsurface investigation report must include all or any part of the following details. The report must describe all borings drilled on-site to test soils and characterize groundwater and must include a site map drawn to scale showing the surveyed locations and elevations of the boring. Boring logs must include a detailed description of materials encountered including any discontinuities such as fractures, fissures, slickensides, lenses, or seams. Each boring must be presented in the form of a log that contains, at a minimum, the boring number; surface elevation and location coordinates; and a columnar section with text showing the elevation of all contacts between soil and rock layers, description of each layer using the unified soil classification, color, degree of compaction, and moisture content. A key explaining the symbols used on the boring logs and the classification terminology for soil type, consistency, and structure must be provided.

(I) If determined to be necessary by the executive director, a sufficient number of borings shall be performed to establish subsurface stratigraphy and to determine geotechnical properties of the soils and rocks beneath the facility. If borings records exist from a previous authorization, additional borings may not be necessary. The number of borings necessary can only be determined after the general characteristics of a site are analyzed. The minimum number of borings

required for a site shall be three for sites of five acres or less, for sites larger than five acres the required number of borings shall be three borings plus one boring for each additional five acres or fraction thereof. The boring plan shall be approved by the executive director prior to making the borings.

(II) Borings shall be sufficiently deep to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers. Borings shall penetrate the uppermost aquifer and all deeper hydraulically interconnected aquifers and be deep enough to identify the aquiclude at the lower boundary. All the borings shall be at least five feet deeper than the elevation of the deepest excavation. In addition, at least the number of borings shown on the Table of Borings shall be drilled to a depth at least 30 feet below the deepest excavation planned at the waste management unit, unless the executive director approves a different depth. If no aquifers exist within 50 feet of the elevation of the deepest excavation, at least one test hole shall be drilled to the top of the first perennial aquifer beneath the site, if sufficient data does not exist to accurately locate it. The executive director may accept data equivalent to a deep boring on the site to determine information for aquifers more than 50 feet below the site. Aquifers more than 300 feet below the lowest excavation and where the estimated travel times for constituents to the aquifer are in excess of 30 years plus the estimated life of the site, need not be identified through borings. The number of borings shall be determined in consultation with the executive director.

(III) All borings shall be conducted in accordance with established field exploration methods. Care must be taken to not extend borings through buried waste and into groundwater.

(IV) Installation, abandonment, and plugging of the boring shall be in accordance with the rules of the commission.

(V) The applicant shall prepare cross-sections utilizing the information from the boring and depicting the generalized strata at the facility.

(VI) The report shall contain a summary of the investigator's interpretations of the subsurface stratigraphy based upon the field investigation.

(v) a groundwater investigation report. If required by the executive director, this report must establish and present the groundwater flow characteristics at the site and must include groundwater elevation, gradient, and direction of flow. The flow characteristics and most likely pathway(s) for pollutant migration must be discussed in a narrative format and shown graphically on a piezometric contour map. The groundwater data must be collected from piezometers installed at the site. The minimum number of piezometers required for the site must be three for sites of five acres or less; for sites greater than five acres the total number of piezometers required must be three piezometers plus one piezometer for each additional five acres or fraction thereof unless otherwise approved by the executive director.

(G) The application shall demonstrate the processing facility is designed so as not to contaminate the groundwater and so as to protect the existing groundwater quality from degradation. At a minimum, groundwater protection must consist of all of the following.

(i) Liner system. All excavated waste storage, processing, and screening shall be located on a surface which is adequately lined to control seepage. The liner shall be covered with a material designed to withstand normal traffic from the processing operations.

(ii) Groundwater monitor system. If required by the executive director, a groundwater monitoring system must be designed and installed such that the system will reasonably assure detection of any contamination of the groundwater before it migrates beyond the boundaries of the processing area.

(I) If required, details of monitor well construction and placement of monitor wells shall be shown on the site plan;

(II) A groundwater sampling program in accordance with Subchapter I of this chapter (relating to Groundwater Monitoring and Corrective Action) shall be provided. Monitoring shall be continued through the duration of processing and until the executive director determines monitoring is no longer needed.

(iii) Interface with existing groundwater protection facilities. Consideration must be given to how excavations around any existing liners, leachate collection systems, and gas collection systems will be handled. Any existing liner, leachate collection system, or gas collection system must be maintained as functional and operated until made obsolete by the progression of excavation.

(H) The facility plan and facility layout shall be prepared by a licensed professional engineer. All proposed facilities, structures, and improvements must be clearly shown and annotated on this drawing. The plan must be drawn to standard engineering scale. Any necessary details or sections must be included. As a minimum the plan must show property boundaries, fencing, internal roadways, processing area, facility office, sanitary facilities, potable water facilities, storage areas, etc. If phasing is proposed for the facility, a separate facility plan for each phase is required.

(I) The process description shall be composed of a descriptive narrative along with a process diagram. The process description shall include all of the following.

(i) Material identification. The applicant shall prepare a list of the typical materials intended for processing along with the anticipated volume to be processed. This section shall also contain an estimate of the daily quantity of material to be processed at the facility along with a description of the proposed process of screening for hazardous materials.

(ii) Excavation process. Indicate the methods of excavating the buried waste materials. Indicate how the material is handled, how long it remains in the area, what equipment is used, how the material is moved from the excavation area, how the area of excavation can be held to a minimum, the maximum side slopes in buried waste, and the maximum area of excavation at any one time. The sequence of excavation shall be shown.

(iii) Process. Indicate what happens to process the waste to recover reusable or recyclable material. Indicate what process or processes are used. The narrative shall include, any water addition, processing rates, equipment, and mass balance calculations.

(iv) Process waters. Indicate how any process water will be handled and disposed of if a wet mining process is to be used.

(v) Product distribution. Provide a complete narrative on product distribution to include items such as disposition of material recovered and probable use of soils on-site and off-site.

(vi) Process diagram. Provide a process diagram that depicts graphically the general process.

(J) The health and safety plan must be composed of a descriptive narrative describing types of equipment and methods of its use for all of the following:

(i) air monitoring;

(ii) radiation monitoring;

(iii) pathogen monitoring;

(iv) hazardous constituent monitoring;

(v) personal protective equipment;

(vi) decontamination plans;

(vii) emergency response plans; and

(viii) fire protection.

(K) Contingency plans must include a description of the courses of action which should be taken in response to abnormal or unsafe events that may occur during excavation or material processing. The contingency plan must address hazard evaluation and protection from potential hazards, including engineering controls, personal protection equipment, and air monitoring techniques. The plan must include decontamination procedures, on-site communication procedures, and emergency procedures. The contingency plan must be composed of a narrative describing actions taken in response to all of the following:

(i) hazardous constituents;

(ii) leachate;

(iii) drums;

(iv) compressed gas cylinders;

(v) unanticipated releases;

(vi) unanticipated emergency;

(vii) fires and explosions;

(viii) hydrogen sulfide; and

(ix) respiratory protection.

(2) Site operating plan. This document is to provide guidance from the design engineer to site management and operating personnel in sufficient detail to enable them to conduct day to day operations in a manner consistent with the engineer's design. As a minimum, the site operating plan shall include specific guidance or instructions on the all of the following:

(A) the minimum number of personnel and their functions to be provided by the site operator in order to have adequate capability to conduct the operation in conformance with the design and operational standards;

(B) the minimum number and operational capacity of each type of equipment to be provided by the site operator in order to have adequate capability to conduct the operation in conformance with the design and operational standards;

(C) security, site access control, traffic control and safety;

(D) control of dumping within designated areas, screening for unprocessable or unauthorized material;

(E) fire prevention and control plan that shall comply with provisions of the local fire code, provision for fire-fighting equipment, and special training requirements for fire fighting personnel;

(F) control of windblown material;

(G) vector control;

(H) quality assurance and quality control. As a minimum the applicant shall provide testing and assurance in accordance with the provisions of §330.417 of this title (relating to Sampling and Analysis Requirements for Soil Final Product);

(I) control of airborne emissions;

(J) minimizing odors;

(K) equipment failures and alternative disposal and storage plans in the event of equipment failure;

(L) a description of the intended final use of materials;

(M) a description of how saturated waste will be dried;

(N) a description of how mining operations will be conducted;

(O) a description of how oversized material such as white goods will be managed;

(P) consideration of odor masking agents;

(Q) a description of how mining operations will be conducted to avoid interference with any daily landfill practices; and

(R) evaluation of excavated material at a determined frequency.

(3) Legal description of the facility. The applicant shall submit an official metes and bounds description, and plat of the landfill area to be mined and an official metes and bounds description, and plat of the process area if the process area is not within the boundaries of the landfill to be mined. The description and plat shall be prepared and sealed by a registered professional land surveyor.

(4) Financial assurance. Municipal solid waste landfill facilities are subject to the requirements specified in Subchapter K of this chapter (relating to Closure, Post-Closure, and Corrective Action) and Chapter 37, Subchapter R of this title (relating to Financial Assurance for Municipal Solid Waste Facilities).

(5) Landowner list. The applicant shall include a list of landowners, residents, and businesses within one-half mile of the facility boundaries along with an appropriately scaled map locating property owned by the landowners.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (commission) adopts amendments to §§335.1, 335.116, 335.123, 335.156, 335.172, 335.204, 335.348, and 335.553. Sections 335.1, 335.116, 335.123, 335.156, 335.172, 335.348, and 335.553 are adopted *with changes* to the proposed text as published in the May 30, 2003 issue of the *Texas Register* (28 TexReg 4266). Section 335.204 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 405, 77th Legislature, established the Texas Board of Professional Geoscientists and the regulation of professional geoscientists. The Texas Geoscience Practice Act (the Act) requires that a person may not take responsible charge of a geoscientific report or a geoscientific portion of a report required by state agency rule unless the person is licensed through the Texas Board of Professional Geoscientists. The primary purpose of the adopted amendments is to establish regulations for the public practice of geoscience in conformance with the Act by requiring a person who prepares and submits geoscientific information to the commission to be a licensed professional geoscientist. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. According to the bill analysis prepared at the time of passage, the ultimate purpose of the Act was public safety through the public registration of the practice of geoscience.

SECTION BY SECTION DISCUSSION

Adopted §335.1, Definitions, amends the introductory paragraph by deleting the word "shall" and the phrase "unless the context clearly indicates otherwise." The definition of licensed professional geoscientist is adopted as new paragraph (85). The definition of person in paragraph (104) is deleted because it is defined in 30 TAC Chapter 3, Definitions. Existing paragraphs (85) - (103) are renumbered accordingly. In addition, an administrative change is made from proposal in paragraph (27) to correct "ground water" to "groundwater."

Adopted §335.116, Applicability of Groundwater Monitoring Requirements, replaces the term "qualified geologist" with "licensed professional geoscientist" regarding the demonstration of groundwater monitoring requirements. In addition, an administrative change is made from proposal in subsection (c)(1)(B) to correct "ground water" to "groundwater."

Adopted §335.123, Closure and Post-Closure (Land Treatment Facilities), replaces the term "independent qualified soil scientist" with "independent licensed professional geoscientist" regarding certification of closures.

Adopted §335.156, Applicability of Groundwater Monitoring and Response, replaces the term "qualified geologist" with "licensed professional geoscientist." At the January 8, 2003 commission agenda for the post-closure rules (Rule Log Number 2000-048-335-WS), the text of §335.156(a)(2) was inadvertently adopted as the text for §335.156(b)(2). Therefore, the correct text of §335.156(b)(2) has been properly added as originally proposed in the post-closure rules. In addition, an administrative change is made from proposal in subsection (b)(3) to correct a typographical error.

Adopted §335.172, Closure and Post-Closure Care (Land Treatment Units), replaces the term "independent qualified soil scientist" with "independent licensed professional geoscientist."

Adopted §335.204, Unsuitable Site Characteristics, replaces the term "qualified geologist" with "licensed professional geoscientist."

Adopted §335.348, General Requirements for Remedial Investigations, adds new subsection (n) requiring that all engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts. In addition, an administrative change is made from proposal in subsection (d)(3) to correct "ground water" to "groundwater."

Adopted §335.553, Required Information, adds the requirement that all engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts. In addition, administrative changes are made from proposal to correct "ground water" to "groundwater" and to correct cross-reference titles.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rules is to establish regulations allowing for the public practice of geoscience in agency procedures in accordance with the Act. The Act requires that a person may not take responsible charge of a geoscientific report or a geoscientific portion of a report required by a state agency rule unless the person is licensed through the Texas Board of Professional Geoscientists. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. The adopted rules are not specifically intended to protect the environment or reduce risks to human health. The adopted rules are intended to establish procedures to require that specific reports and necessary data submitted to the commission be produced, signed, sealed, and dated by licensed professional geoscientists who have obtained their licenses through the Texas Board of Professional Geoscientists. Therefore, it is not anticipated that the adopted rules will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that these adopted rules do not meet the definition of major environmental rule.

Furthermore, even if the adopted rules did meet the definition of a major environmental rule, the rules are not subject to Texas Government Code, §2001.0225, because they do not accomplish any of the four results specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these requirements. First, there are no federal standards that these rules

would exceed. Second, the adopted rules do not exceed an express requirement of state law. Third, there is no delegation agreement that would be exceeded by these adopted rules. Fourth, the commission adopts these rules to allow for the public practice of geoscience in agency procedures in accordance with the Act. Therefore, the commission does not adopt the rules solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific intent of the rules is to establish regulations allowing for the public practice of geoscience in agency procedures in accordance with the Act. The adopted rules would substantially advance this stated purpose by requiring that specific reports and necessary data submitted to the commission be produced, signed, sealed, and dated by licensed professional geoscientists who have obtained their licenses through the Texas Board of Professional Geoscientists.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the rules do not affect a landowner's rights in private real property by burdening private real property, nor restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise exist in the absence of the adopted rules. These rules simply require that specific portions of applications or necessary data submitted to the commission be produced, signed, sealed, and dated by a qualified professional individual who has demonstrated his or her qualifications by obtaining a license to engage in the public practice of geoscience from the Texas Board of Professional Geoscientists. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. These adopted rules do not affect any private real property.

There are no burdens imposed on private real property, and the benefits to society are better applications for environmental permits based upon reliable reports and data submitted by qualified licensed professional geoscientists.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the construction and operation of solid waste treatment, storage, and disposal facilities, and the discharge of municipal and industrial wastewater to coastal waters. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because the adopted rule changes do not modify or alter standards set forth in existing rules, and do not govern or authorize any actions subject to the CMP. The adopted rulemaking would require a person who prepares and submits geoscientific information to the agency to be a licensed professional geoscientist. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act.

PUBLIC COMMENT

A public hearing was not held on this rulemaking and one comment was received from the Texas Board of Professional Geoscientists (TBPG) during the comment period, which closed June 30, 2003.

RESPONSE TO COMMENT

TBPG stated that the proposed rules add needed clarification to commission rules as the rules relate to the role of professional geoscientists. TBPG recommended that §335.123(e) be modified to remove the requirement that certification be performed by the owner or operator in some cases.

The commission disagrees with this comment. 40 Code of Federal Regulations (CFR) §265.115, referenced in 30 TAC §335.123(e), requires that the owner/operator submit certification that a hazardous waste management unit or facility has been closed in accordance with the approved closure plan. Moreover, the certification must be signed by both the owner/operator and an independent licensed professional engineer or an independent licensed professional geoscientist. No change has been made in response to this comment.

TBPG commented that §335.123(e) should be modified to provide that the certification in question can be performed by either an independent licensed professional geoscientist or an independent licensed professional engineer.

40 CFR §265.115 requires certifications by an independent registered professional engineer. Section 335.123(e) allows an independent licensed professional geoscientist to certify closures in lieu of an independent licensed professional engineer. No change has been made in response to this comment.

TBPG commented that §335.172(b) should be modified to require that certification be performed by an "independent" licensed professional geoscientist.

The commission agrees with this comment and has changed the rule language to add the word "independent" before "licensed professional geoscientist."

TBPG commented that the "in lieu of" language be replaced by "or" in §335.172(b).

The commission disagrees with this comment. Existing rule language supports the TBPG recommendation to allow certifications by both independent licensed professional engineers and geoscientists. The use of the words "in lieu of" in §335.123(e) correctly highlights the fact that state regulations provide certification by independent licensed professional geoscientists as an alternative to the professional engineers required by the federal regulations. No change has been made in response to this comment.

TBPG commented that the term "registered professional engineer" should be replaced with "licensed professional engineer."

The commission agrees with this comment, and has added the word "licensed" to §335.172(b), regarding closure and post-closure of permitted status hazardous waste management units, to mirror §335.123(e) concerning closure and post-closure of interim status hazardous waste management units.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §335.1

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§335.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings.

(1) Aboveground tank--A device meeting the definition of tank in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--Texas Health and Safety Code, Chapter 361.

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. (See also "closed portion" and "inactive portion.")

(5) Activities associated with the exploration, development, and protection of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the EPA in accordance with the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq*.).

(6) Administrator--The administrator of the EPA or his designee.

(7) Ancillary equipment--Any device that is used to distribute, meter, or control the flow of solid waste or hazardous waste from its point of generation to a storage or processing tank(s), between solid waste or hazardous waste storage and processing tanks to a point of disposal on-site, or to a point of shipment for disposal off-site. Such devices include, but are not limited to, piping, fittings, flanges, valves, and pumps.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Area of concern--Any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration.

(10) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(11) Battery--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(12) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream); and

(ii) fluidized bed combustion units;

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance to be Classified as a Boiler).

(13) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(14) Certification--A statement of professional opinion based upon knowledge and belief.

(15) Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(16) Class 2 wastes--Any individual solid waste or combination of industrial solid waste which cannot be described as Hazardous, Class 1 or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(17) Class 3 wastes--Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination).

(18) Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion.")

(19) Closure--The act of permanently taking a waste management unit or facility out of service.

(20) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person, where "captured facility" means a manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(21) Component--Either the tank or ancillary equipment of a tank system.

(22) Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(23) Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(24) Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(25) Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.152(a)(19) or §335.112(a)(21) of this title (relating to Standards).

(26) Contaminant--Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter, "pollutant" as defined in Texas Water Code (TWC), §26.001, and Texas Health and Safety Code (THSC), §361.431, "hazardous substance" as defined in THSC, §361.003, and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, TWC, §§26.261 - 26.268.

(27) Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, groundwater or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(28) Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(29) Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(30) Corrective action management unit (CAMU)--An area within a facility that is designated by the commission under 40 Code of Federal Regulations Part 264, Subpart S, for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (Corrective Action related to Hazardous Waste). A CAMU shall only be used for the management of remediation wastes in accordance with implementing such corrective action requirements at the facility.

(31) Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(32) Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(33) Designated facility--A Class 1 or hazardous waste storage, processing, or disposal facility which has received an EPA permit (or a facility with interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 270 and 124; a permit from a state authorized in accordance with 40 CFR Part

271 (in the case of hazardous waste); a permit issued in accordance with §335.2 of this title (relating to Permit Required) (in the case of nonhazardous waste); or that is regulated under §335.24(f), (g), or (h) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) or §335.241 of this title (relating to Applicability and Requirements) and that has been designated on the manifest by the generator in accordance with §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). If a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste.

(34) Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(35) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(36) Dioxins and furans (D/F)--Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(37) Discharge or hazardous waste discharge--The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(38) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(39) Disposal facility--A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(40) Drip pad--An engineered structure consisting of a curbed, free-draining base, constructed of a non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(41) Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 Code of Federal Regulations (CFR) §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of tank, tank system, container, transport vehicle, or vessel as defined in this section.

(42) Environmental Protection Agency acknowledgment of consent--The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(43) Environmental Protection Agency hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations (CFR) Part 26l, Subpart D and to each characteristic identified in 40 CFR Part 26l, Subpart C.

(44) Environmental Protection Agency identification number--The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(45) Essentially insoluble--Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or EPA limits for drinking water as published in the *Federal Register*.

(46) Equivalent method--Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations §260.20 and §260.21.

(47) Existing portion--That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(48) Existing tank system or existing component--A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations--which cannot be canceled or modified without substantial loss--for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(49) Explosives or munitions emergency--A situation involving the suspected or detected presence of unexploded ordnance, damaged or deteriorated explosives or munitions, an improvised explosive device, other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(50) Explosives or munitions emergency response--All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(51) Explosives or munitions emergency response specialist--An individual trained in chemical or conventional munitions

or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal, technical escort unit, and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(52) Extrusion--A process using pressure to force ground poultry carcasses through a decreasing-diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(53) Facility--Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several storage, processing, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), all contiguous property under the control of the owner or operator seeking a permit for the storage, processing, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste).

(54) Final closure--The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(55) Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(56) Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(57) Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(58) Generator--Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.

(59) Groundwater--Water below the land surface in a zone of saturation.

(60) Hazardous industrial waste--Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the EPA in accordance with the RCRA of 1976, §3001. The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations Part 26l. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(61) Hazardous substance--Any substance designated as a hazardous substance under the CERCLA, 40 Code of Federal Regulations Part 302.

(62) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the EPA in accordance with the federal Solid Waste Disposal Act, as amended by the RCRA, 42 United States Code §§6901 *et seq*., as amended.

(63) Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations (CFR) Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(64) Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly- or privately-owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(65) Hazardous waste management unit--A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(66) In operation--Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(67) Inactive portion--That portion of a facility which is not operated after November 19, 1980. (See also "active portion" and "closed portion.")

(68) Incinerator--Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of infrared incinerator or plasma arc incinerator.

(69) Incompatible waste--A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(70) Individual generation site--The contiguous site at or on which one or more solid waste or hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of solid waste or hazardous waste, but is considered a single or individual generation site if the site or property is contiguous.

(71) Industrial furnace--Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(72) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

(73) Infrared incinerator--Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(74) Inground tank--A device meeting the definition of tank in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(75) Injection well--A well into which fluids are injected. (See also "underground injection.")

(76) Inner liner--A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(77) Installation inspector--A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(78) International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(79) Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(80) Land treatment facility--A facility or part of a facility at which solid waste or hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management unit; such facilities are disposal facilities if the waste will remain after closure.

(81) Landfill--A disposal facility or part of a facility where solid waste or hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(82) Landfill cell--A discrete volume of a solid waste or hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(83) Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(84) Leak-detection system--A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste into the secondary containment structure.

(85) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(86) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of solid waste or hazardous waste, hazardous waste constituents, or leachate.

(87) Management or hazardous waste management--The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of solid waste or hazardous waste.

(88) Manifest--The waste shipping document which accompanies and is used for tracking the transportation, disposal, treatment, storage, or recycling of shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is TNRCC-0311 (Uniform Hazardous Waste Manifest) which is furnished by the executive director or may be printed through the agency's "Print Your Own Manifest Program."

(89) Manifest document number--A number assigned to the manifest by the commission for reporting and recordkeeping purposes.

(90) Military munitions--All ammunition products and components produced or used by or for the Department of Defense (DOD) or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds,

artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(91) Miscellaneous unit--A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, staging pile, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research Development and Demonstration Permits).

(92) Movement--That solid waste or hazardous waste transported to a facility in an individual vehicle.

(93) Municipal hazardous waste--A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the EPA.

(94) Municipal solid waste--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(95) New tank system or new tank component--A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations (CFR) §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 CFR §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986. (See also "existing tank system.")

(96) Off-site--Property which cannot be characterized as on-site.

(97) Onground tank--A device meeting the definition of tank in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(98) On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(99) Open burning--The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. (See also "incineration" and "thermal treatment.")

(100) Operator--The person responsible for the overall operation of a facility.

(101) Owner--The person who owns a facility or part of a facility.

(102) Partial closure--The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(103) PCBs or polychlorinated biphenyl compounds--Compounds subject to 40 Code of Federal Regulations Part 761.

(104) Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste or industrial solid waste storage, processing, or disposal facility in accordance with specified limitations.

(105) Personnel or facility personnel--All persons who work at, or oversee the operations of, a solid waste or hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(106) Pesticide--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(107) Petroleum substance--A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code (USC), §§6921, *et seq.*)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances--i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels--a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes, but is not limited to, stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines--i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels--i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils--i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils--i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5-heavy, and Number 6;

(vii) gas-turbine fuel oils--i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4-GT;

(viii) illuminating oils--i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants--i.e., automotive and industrial lubricants;

(x) building materials--i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials--i.e., transformer oils and cable oils; and

(xii) used oils--See definition for "used oil" in this section.

(B) For the purposes of this chapter, a "petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 USC, §§6921, *et seq*.)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

(i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;

(ii) animal, microbial, and vegetable fats;

(iii) food grade oils;

(iv) hardened asphalt and solid asphaltic materials--i.e., roofing shingles, roofing felt, hot mix (and cold mix); and

(v) cosmetics.

(108) Pile--Any noncontainerized accumulation of solid, nonflowing solid waste or hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(109) Plasma arc incinerator--Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(110) Post-closure order--An order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units.

(111) Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(112) Poultry carcass--The carcass, or part of a carcass, of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(113) Poultry facility--A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(114) Primary exporter--Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(115) Processing--The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the administrator of the EPA in accordance with the federal Solid Waste Disposal Act, as amended by the RCRA, 42 United States Code, §§6901 *et seq*., as amended.

(116) Publicly-owned treatment works (POTW)--Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(117) Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(118) Receiving country--A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(119) Regional administrator--The regional administrator for the EPA region in which the facility is located, or his designee.

(120) Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(121) Remediation waste--All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under TSWDA, §361.303 (Corrective Action),

§335.166(5) of this title (relating to Corrective Action Program), or §335.167(c) of this title.

(122) Remove--To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for storage, processing, or disposal.

(123) Replacement unit--A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or EPA or state approved corrective action.

(124) Representative sample--A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(125) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(126) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(127) Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(128) Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means offsite.

(129) Sludge dryer--Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 British thermal units per pound of sludge treated on a wet-weight basis.

(130) Small quantity generator--A generator who generates less than 1,000 kilogram of hazardous waste in a calendar month.

(131) Solid waste--

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued in accordance with Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored, or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas in accordance with the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas, or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the EPA in accordance with the federal Solid Waste Disposal Act, as amended by the RCRA, 42 United States Code, §§6901 *et seq*., as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §261.4(a)(1) - (19), as amended through May 11, 1999, (64 FR 25408), subject to the changes in this clause, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusion under 40 CFR §261.4(a)(16), 40 CFR §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292), and is revised as follows, with "subparagraph (A)(iv) under the definition of 'Solid Waste' in 30 TAC §335.1" meaning "subparagraph (A)(iv) under the definition of 'Solid Waste' in §335.1 of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under subparagraph (A)(iv) under the definition of 'Solid Waste' in 30 TAC §335.1," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3) - (5), the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to "§335.1(129)(D)(iv) of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph;

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph; or

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(D) Except for materials described in subparagraph (H) of this paragraph, materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33, but that exhibit one or more of the hazardous waste characteristics, or will be considered nonhazardous waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)).

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.

Figure: 30 TAC §335.1(131)(D)(iv) (No change.)

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) Except for materials described in subparagraph (H) of this paragraph, the following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the EPA, as described in 40 CFR §261.2(d)(1) - (2).

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that will otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as will be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land and the material, as generated:

(I) is a Class 3 waste under Subchapter R of this chapter (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Subchapter R of this chapter; and

(-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3 of this title (relating to Metal Limits); and

(viii) notwithstanding the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §§335.17 - 335.19 of this title, §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(132) Sorbent--A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(133) Spill--The accidental spilling, leaking, pumping, emitting, emptying, or dumping of solid waste or hazardous wastes or materials which, when spilled, become solid waste or hazardous wastes into or on any land or water.

(134) Staging pile--An accumulation of solid, non-flowing remediation waste, as defined in this section, that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the executive director according to the requirements of 40 Code of Federal Regulations §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(135) Storage--The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere.

(136) Sump--Any pit or reservoir that meets the definition of tank in this section and those troughs/trenches connected to it that serve to collect solid waste or hazardous waste for transport to solid waste or hazardous waste storage, processing, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(137) Surface impoundment or impoundment--A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(138) Tank--A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(139) Tank system--A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(140) TEQ--Toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8-tetrachlorodibenzo-p-dioxin.

(141) Thermal processing--The processing of solid waste or hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the solid waste or hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning.")

(142) Thermostat--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(143) Totally enclosed treatment facility--A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(144) Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

(145) Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(146) Transport vehicle--A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(147) Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(148) Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 Code of Federal Regulations §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(149) Treatment--To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(150) Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(151) Underground injection--The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well.")

(152) Underground tank--A device meeting the definition of tank in this section whose entire surface area is totally below the surface of and covered by the ground.

(153) Unfit-for-use tank system--A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing solid waste or hazardous waste without posing a threat of release of solid waste or hazardous waste to the environment.

(154) Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) of this title (relating to Universal Waste Rule) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(155) Universal waste handler--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(156) Universal waste transporter--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(157) Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(158) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(159) Used oil--Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, Conditionally Exempt Small Quantity Generator hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil) and 40 Code of Federal Regulations Part 279 (Standards for Management of Used Oil).

(160) Wastewater treatment unit--A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 *et seq*., §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of tank or tank system as defined in this section.

(161) Water (bulk shipment)--The bulk transportation of municipal hazardous waste or Class 1 industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(162) Well--Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(163) Zone of engineering control--An area under the control of the owner/operator that, upon detection of a solid waste or hazardous waste release, can be readily cleaned up prior to the release of solid waste or hazardous waste or hazardous constituents to groundwater or surface water.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
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For further information, please call: (512) 239-0348

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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §335.116, §335.123

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§335.116. Applicability of Groundwater Monitoring Requirements.

(a) On November 19, 1981, the owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility, except as provided in subsection (c) of this section.

(b) Except as provided in subsections (c), (d), and (g) of this section, the owner or operator must install, operate, and maintain a groundwater monitoring system which meets the requirements of 40 Code of Federal Regulations (CFR) §265.91, and must comply with 40 CFR §265.92 and §265.93, and §335.117 of this title (relating to Recordkeeping and Reporting). This groundwater monitoring program must be carried out during the active life of the facility, and for disposal facilities during the post-closure care period as well.

(c) All or part of the groundwater monitoring requirements of this subchapter may be waived if the owner or operator can demonstrate that there is a low potential for migration of hazardous waste or hazardous waste constituents from the facility via the uppermost aquifer to water supply wells (domestic, industrial, or agricultural) or to surface water. This demonstration must be in writing and must be kept at the facility. This demonstration shall be certified by a licensed professional geoscientist or geotechnical engineer and must establish the following:

(1) the potential for migration of hazardous waste constituents from the facility to the uppermost aquifer, by an evaluation of:

(A) a water balance of precipitation, evapotranspiration, runoff, and infiltration; and

(B) unsaturated zone characteristics (i.e., geologic materials, physical properties, and depth to groundwater); and

(2) the potential for hazardous waste or hazardous waste constituents which enter the uppermost aquifer to migrate to a water supply well or surface water, by an evaluation of:

(A) saturated zone characteristics (i.e., geologic materials, physical properties, and rate of groundwater flow); and

(B) the proximity of the facility to water supply wells or surface water.

(d) If an owner or operator assumes (or knows) that groundwater monitoring of indicator parameters in accordance with 40 CFR §265.91 and §265.92 would show statistically significant increases (or decreases in the case of pH) when evaluated under 40 CFR §265.93(b), he may install, operate, and maintain an alternate groundwater monitoring system (other than the one described in 40 CFR §265.91 and §265.92). If the owner or operator does decide to use an alternate groundwater monitoring system he must:

(1) prior to November 19, 1981, submit to the executive director a specific plan certified by a qualified geologist or geotechnical engineer which satisfies the requirements of 40 CFR §265.93(d)(3), for an alternate groundwater monitoring system;

(2) prior to November 19, 1981, initiate the determinations specified in 40 CFR §265.93(d)(4);

(3) prepare and submit a written report in accordance with 40 CFR §265.93(d)(5);

(4) continue to make the determinations specified in 40 CFR §265.93(d)(4) on a quarterly basis until final closure of the facility; and

(5) comply with the recordkeeping and reporting requirements in §335.117 of this title.

(e) The groundwater monitoring requirements of this subchapter may be waived with respect to any surface impoundment that:

(1) is used to neutralize wastes which are hazardous solely because they exhibit the corrosivity characteristic under 40 CFR §261.22 or are listed as hazardous wastes in 40 CFR Part 261, Subpart D, only for this reason; and

(2) contains no other hazardous wastes, if the owner or operator can demonstrate that there is no potential for migration of hazardous wastes from the impoundment. The demonstrations must establish, based upon consideration of the characteristics of the wastes and the impoundment, that the corrosive wastes will be neutralized to the extent that they no longer meet the corrosivity characteristic before they can migrate out of the impoundment. The demonstration must be in writing and must be certified by a qualified professional.

(f) For owners and operators who have not established background concentrations or values in accordance with 40 CFR §265.92(c) by November 19, 1982, the executive director may require the implementation of a groundwater assessment plan under 40 CFR §265.93, whenever he determines that existing data indicates that there is a substantial likelihood that hazardous waste or hazardous constituents from the facility have entered the uppermost aquifer.

(g) The commission may replace all or part of the requirements of this subchapter applying to a regulated unit with alternative requirements developed for groundwater monitoring set out in a permit or a post-closure order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the requirement of this subchapter because the alternative requirements will be protective of human health and the environment. The alternative standards for the regulated unit must meet the requirements of §335.8 and §335.167 of this title (related to Closure and Remediation and Corrective Action for Solid Waste Management Units).

§335.123. Closure and Post-Closure (Land Treatment Facilities).

(a) In the closure plan under 40 Code of Federal Regulations (CFR) §265.112 and the post-closure plan under 40 CFR §265.118, the owner or operator must address the following objectives and indicate how they will be achieved:

(1) control of the migration of hazardous waste and hazardous waste constituents from the treated area into the groundwater;

(2) control of the release of contaminated run-off from the facility into surface water;

(3) control of the release of airborne particulate contaminants caused by wind erosion; and

(4) compliance with 40 CFR §265.276, concerning the growth of food-chain crops.

(b) The owner or operator must consider at least the following factors addressing the closure and post-closure care objectives of subsection (a) of this section:

(1) type and amount of hazardous waste and hazardous waste constituents applied to the land treatment facility;

(2) the mobility and the expected rate of migration of the hazardous waste and hazardous waste constituents;

(3) site location, topography, and surrounding land use, with respect to the potential effects of pollutant migration (e.g., proximity to groundwater, surface water, and drinking water sources);

(4) climate, including amount, frequency, and pH or precipitation;

(5) geological and soil profiles and surface and subsurface hydrology of the site, and soil characteristics, including cation exchange capacity, total organic carbon, and pH;

(6) unsaturated zone monitoring information obtained under 40 CFR §265.278; and

(7) type, concentration, and depth of migration of hazardous waste constituents in the soil as compared to their background concentrations.

(c) The owner or operator must consider at least the following methods in addressing the closure and post-closure care objectives of subsection (a) of this section:

(1) removal of contaminated soils;

(2) placement of a final cover, considering:

(A) functions of the cover (e.g., infiltration control, erosion and run-off control, and wind erosion control), and

(B) characteristics of the cover, including material, final surface contours, thickness, porosity and permeability, slope, length of run of slope, and type of vegetation on the cover;

(3) collection and treatment run-off;

(4) diversion structures to prevent surface water run-on from entering the treated area; and

(5) monitoring of soil, soil-pore water, and groundwater.

(d) In addition to the requirements of 40 CFR Part 265; Subpart G, relating to closure and post-closure, §335.118 of this title (relating to Closure Plan; Submission and Approval of Plan) and §335.119 of this title (relating to Post-Closure Plan; Submission and Approval Plan), during the closure period the owner or operator of a land treatment facility must:

(1) continue unsaturated zone monitoring in a manner and frequency specified in the closure plan, except that soil pore liquid monitoring may be terminated 90 days after the last application of waste to the treatment zone;

(2) maintain the run-on control system required under §335.121(b) of this title (relating to General Operating Requirements (Land Treatment Facilities));

(3) maintain the run-off management system required under §335.121(c) of this title; and

(4) control wind dispersal of particulate matter which may be subject to wind dispersal.

(e) For the purpose of complying with 40 CFR §265.115 concerning certification of closure, when closure is completed, the owner or operator may submit to the executive director certification both by the owner or operator and by an independent licensed professional geoscientist, in lieu of an independent licensed professional engineer, that the facility has been closed in accordance with the specifications in the approved closure plan.

(f) In addition to the requirements of 40 CFR §265.117 concerning post-closure care and use of property during the post-closure care period, the owner or operator of a land treatment unit must:

(1) continue soil-core monitoring by collecting and analyzing samples in a manner and frequency specified in the post-closure plan;

(2) restrict access to the unit as appropriate for its post-closure use;

(3) assure that growth of food chain crops complies with 40 CFR §265.276 concerning food chain crops; and

(4) control wind dispersal of hazardous waste.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
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For further information, please call: (512) 239-0348

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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §335.156, §335.172

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§335.156. Applicability of Groundwater Monitoring and Response.

(a) Except as provided in subsection (b) of this section, the rules pertaining to groundwater monitoring and response apply to owners and operators of facilities that process, store, or dispose of hazardous waste.

(1) The owner or operator must satisfy those requirements of paragraph (2) or (3) of this subsection for all wastes (or constituents thereof) contained in any such waste management unit at the facility, regardless of the time at which waste was placed in the units.

(2) Except as provided in paragraph (3) of this subsection, all solid waste management units must comply with the requirements in §335.167 of this title (relating to Corrective Action for Solid Waste Management Units). A surface impoundment, waste pile, land treatment unit, or landfill that receives hazardous waste after July 26, 1982, (hereinafter referred to as a regulated unit) must comply with the requirements of §§335.157 - 335.166 of this title (relating to Required Program; Groundwater Protection Standard; Hazardous Constituents; Concentration Limits; Point of Compliance; Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program) in lieu of §335.167 of this title for purposes of detecting, characterizing, and responding to releases to the uppermost aquifer. The financial responsibility requirements of §335.167 of this title apply to regulated units.

(3) The commission may replace all or part of the requirements of §§335.157 - 335.166 of this title with alternative requirements for groundwater monitoring and corrective action for releases to groundwater set out in the permit or in a post-closure order where the commission determines that:

(A) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(B) it is not necessary to apply the groundwater monitoring and corrective action requirements of §§335.157 - 335.166 of this title because the alternative requirements will be protective of human health and the environment.

(4) If a permitted facility obtains an order setting out alternative requirements provided in §335.151(e) of this title (relating to Purpose, Scope, and Applicability), then the alternative requirements shall also be referenced in the facility's permit.

(b) The owner or operator's regulated unit or units are not subject to regulation for releases into the uppermost aquifer under this section and §§335.157 - 335.166 of this title if:

(1) he is exempted under 40 Code of Federal Regulations (CFR) §264.1;

(2) he operates a unit which the commission finds:

(A) is an engineered structure;

(B) does not receive or contain liquid waste or waste containing free liquids;

(C) is designed and operated to exclude liquid, precipitation, and other run-on and run-off;

(D) has both inner and outer layer of containment enclosing the waste;

(E) has a leak detection system built into each containment layer for which continuing operation and maintenance will be provided during the active life of the unit and the closure and post-closure care periods; and

(F) to a reasonable degree of certainty, will not allow hazardous constituents to migrate beyond the outer containment layer prior to the end of the post-closure care period.

(3) the commission finds, in accordance with 40 CFR §264.280(d), that the treatment zone of a land treatment unit that qualifies as a regulated unit does not contain levels of hazardous constituents that are above backgrounds levels of those constituents by an amount that is statistically significant, and if an unsaturated zone monitoring program meeting the requirements of 40 CFR §264.278 has not shown a statistically significant increase in hazardous constituents below the treatment zone during the operating life of the unit. An exemption under this paragraph can only relieve an owner or operator of responsibility to meet the requirements of this subchapter relating to groundwater monitoring and response during the post-closure care period;

(4) the commission finds that there is no potential for migration of liquid from a regulated unit to the uppermost aquifer during the active life of the regulated unit (including the closure period) and the post-closure care period specified under 40 CFR §264.117. This demonstration shall be certified by a licensed professional geoscientist or geotechnical engineer. In order to provide an adequate margin of safety in the prediction of potential migration of liquid, the owner or operator shall base any predictions on assumptions that maximize the rate of liquid migration; or

(5) he designs and operates a pile in compliance with 40 CFR §264.250(c).

(c) Sections 335.157 - 335.166 of this title apply during the active life of the regulated unit (including the closure period). After closure of the regulated unit, these sections:

(1) do not apply if all waste, waste residues, contaminated containment system components, and contaminated subsoils are removed or decontaminated at closure;

(2) apply during the post-closure care period under 40 CFR §264.117 if the owner or operator is conducting a detection monitoring program under §335.164 of this title; or

(3) apply during the compliance period under §335.162 of this title if the owner or operator is conducting a compliance monitoring program under §335.165 of this title or a corrective action program under §335.166 of this title.

§335.172. Closure and Post-Closure Care (Land Treatment Units).

(a) During the closure period, the owner or operator must:

(1) continue all operations (including pH control) necessary to maximize degradation, transformation, or immobilization of hazardous constituents within the treatment zone as required under §335.171(1) of this title (relating to Design and Operating Requirements (Land Treatment Units)), except to the extent such measures are inconsistent with paragraph (8) of this subsection;

(2) continue all operations in the treatment zone to minimize run-off of hazardous constituents as required under §335.171(3) of this title;

(3) maintain the run-on control system required under §335.171(3) of this title;

(4) maintain the run-off management system required under §335.171(4) of this title;

(5) control wind dispersal of hazardous waste if required under §335.171(6) of this title;

(6) continue to comply with any prohibitions or conditions concerning growth of food-chain crops under 40 Code of Federal Regulations (CFR) §264.276;

(7) continue unsaturated zone monitoring in compliance with 40 CFR §264.278, except that soil- pore liquid monitoring may be terminated 90 days after the last application of waste to the treatment zone; and

(8) establish a vegetative cover on the portion of the facility being closed at such time that the cover will not substantially impede degradation, transformation, or immobilization of hazardous constituents in the treatment zone. The vegetative cover must be capable of maintaining growth without extensive maintenance.

(b) For the purpose of complying with 40 CFR §264.115, when closure is completed, the owner or operator may submit to the executive director certification by an independent licensed professional geoscientist, in lieu of an independent licensed professional engineer, that the facility has been closed in accordance with the specifications in the approved closure plan.

(c) During the post-closure care period, the owner or operator must:

(1) continue all operations (including pH control) necessary to enhance degradation and transformation and sustain immobilization of hazardous constituents in the treatment zone to the extent that such measures are consistent with other post-closure care activities;

(2) maintain a vegetative cover over closed portions of the facility;

(3) maintain the run-on control system required under §335.171(3) of this title;

(4) maintain the run-off management system required under §335.171(4) of this title;

(5) control wind dispersal of hazardous waste if required under §335.171(6) of this title;

(6) continue to comply with any prohibition or conditions concerning growth of food-chain crops under 40 CFR §264.276; and

(7) continue unsaturated zone monitoring in compliance with 40 CFR §264.278, except that soil- pore liquid monitoring may be terminated 90 days after the last application of waste to the treatment zone.

(d) The owner or operator is not subject to regulation under subsections (a)(8) and (c) of this section if the commission finds that the level of hazardous constituents in the treatment zone does not exceed the background value of those constituents by an amount that is statistically significant when using the test specified in paragraph (3) of this subsection. The owner or operator may submit such a demonstration to the executive director at any time during the closure or post-closure care periods.

(1) The owner or operator must establish background soil values and determine whether there is a statistically significant increase over those values for all hazardous constituents specified in the facility permit under 40 CFR §264.271(b).

(A) Background soil values may be based on a one-time sampling of a background plot having characteristics similar to those of the treatment zone.

(B) The owner or operator must express background values and values for hazardous constituents in the treatment zone in a form necessary for the determination of statistically significant increases under paragraph (3) of this subsection.

(2) In taking samples used in the determination of background and treatment zone values, the owner or operator must take samples at a sufficient number of sampling points and at appropriate locations and depths to yield samples that represent the chemical make-up of soil that has not been affected by solid waste or leakage from the treatment zone, and the soil within the treatment zone, respectively.

(3) In determining whether a statistically significant increase has occurred, the owner or operator must compare the value of each constituent in the treatment zone to the background value for that constituent using a statistical procedure that provides reasonable confidence that constituent presence in the treatment zone will be identified. The owner or operator must use a statistical procedure that:

(A) is appropriate for the distribution of the data used to establish background values; and

(B) provides a reasonable balance between the probability of falsely identifying hazardous constituent presence in the treatment zone and the probability of failing to identify real presence in the treatment zone.

(e) The owner or operator is not subject to regulation under §§335.156 - 335.166 of this title (relating to Applicability of Groundwater Monitoring and Response; Required Programs; Groundwater Protection Standard; Hazardous Constituents; Concentration Limits; Point of Compliance; Compliance Period; General Groundwater Monitoring Requirements; Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program); if the commission finds that the owner or operator satisfied subsection (d) of this section and if unsaturated zone monitoring under 40 CFR §264.278 indicates that hazardous constituents have not migrated beyond the treatment zone during the active life of the land treatment unit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
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SUBCHAPTER G. LOCATION STANDARDS FOR HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL

30 TAC §335.204

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER K. HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND REMEDIATION

30 TAC §335.348

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§335.348. General Requirements for Remedial Investigations.

(a) Unless otherwise directed by the commission, a remedial investigation as approved by the executive director shall be completed before the executive director's selection of the remedial action, except for removals and preliminary site investigations in accordance with §335.346 of this title (relating to Removals and Preliminary Site Investigations).

(b) A similar study may be approved by the executive director as an appropriate alternative to the performance of a full remedial investigation when necessary to avoid delay, to make more effective use of resources or when such similar study is sufficient to adequately characterize a site.

(c) The contents of the remedial investigation as approved by the executive director, will depend on the particular circumstances of each specific facility. Under any remedial investigation, however, sufficient information must be collected and evaluated to allow the executive director to select an appropriate remedial action.

(d) A remedial investigation may include the following, as appropriate to a particular facility, for the purpose of allowing the executive director to select an appropriate remedial action:

(1) investigations of surface water and sediments necessary to characterize hydrologic features such as surface drainage patterns, areas of erosion and sediment deposition, surface waters, floodplains, and actual or potential hazardous substance migration routes within these areas. Properties of surface and subsurface sediments, which would influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions, shall be characterized;

(2) investigations to adequately characterize the nature and extent of hazardous substances in the soils encompassing the facility. Properties associated with the soils, which would influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions, shall be characterized;

(3) investigations of hydrogeology and geology to adequately characterize the nature and extent of hazardous substances in the groundwater and the features which affect the fate and transport of those hazardous substances. This should include, but is not limited to, the physical properties and distribution of bedrock and unconsolidated materials, groundwater flow rate and gradient for contaminated and potentially contaminated aquifers, groundwater divides, areas of groundwater recharge and discharge, and location of public and private groundwater wells;

(4) information regarding local climatological characteristics which are likely to affect the hazardous substance migration such as: rainfall patterns; frequency of storm events; temperature variations; prevailing wind direction; and wind velocity;

(5) an ecological risk assessment;

(6) descriptions of the location, quantity, horizontal and vertical extent, concentrations and sources of hazardous substances. Information on the physical and chemical characteristics and the toxicological effects of hazardous substances shall be provided, if available; and

(7) a feasibility study.

(e) Protective concentration levels shall be developed in accordance with Chapter 350, Subchapter D of this title (relating to Development of Protective Concentration Levels).

(f) A workplan for a remedial investigation shall be submitted to the executive director for final review and possible modifications and shall include the following:

(1) a sampling and analysis plan covering all sampling activities to be undertaken in accordance with the remedial investigation;

(2) a quality assurance project plan to ensure the integrity of all samples taken in accordance with the remedial investigation;

(3) a health and safety plan to describe steps to be taken to assure the health and safety of all personnel engaged in implementing the remedial investigation; and

(4) an implementation schedule for all aspects of the remedial investigation.

(g) Treatability studies may be required as necessary to provide information to evaluate remedial action alternatives.

(h) In evaluating the acceptability of a remedial investigation, the executive director may require the utilization of published agency and EPA technical guidance documents.

(i) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards associated with implementing the remedial investigation at a particular facility.

(j) A report shall be prepared at the completion of the remedial investigation and submitted to the executive director for review, possible modification, and final approval.

(k) The selection of the remedial alternative shall be made according to the process outlined in the guidance document "Presumptive Remedies for Soils at Texas State Superfund Sites" or other applicable presumptive remedy documents, unless the executive director determines that a feasibility study must be conducted.

(l) The remedial action for a particular facility shall be selected based on the remedial alternative that the executive director determines to be the lowest cost alternative which is technologically feasible and reliable, effectively mitigates and minimizes damage to the environment, and provides adequate protection of the public health and safety and the environment.

(m) All engineering evaluations, plans, and specifications included in the feasibility study or similar study must be prepared and submitted in accordance with the Texas Engineering Practice Act.

(n) All engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER S. RISK REDUCTION STANDARDS

30 TAC §335.553

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

§335.553. Required Information.

(a) For Risk Reduction Standard Number 1 or 2, the person shall provide a final report that documents attainment of the risk reduction standard in accordance with §335.554 or §335.555 of this title (relating to Attainment of Risk Reduction Standard Number 1 and Attainment of Risk Reduction Standard Number 2). The report shall include, but is not limited to, descriptions of procedures and conclusions of the investigation to characterize the nature, extent, direction, rate of movement, volume, composition and concentration of contaminants in environmental media; basis for selecting environmental media of concern; documentation supporting selection of exposure factors; descriptions of removal or decontamination procedures performed in closure or remediation; summaries of sampling methodology and analytical results which demonstrate that contaminants have been removed or decontaminated to applicable levels; and a document that the person proposes to use to fulfill the requirements of §335.560(b) of this title (relating to Post-Closure Care and Deed Certification for Risk Reduction Standard Number 2), as applicable.

(b) Risk Reduction Standard Number 3, the person shall conduct the activities set forth in paragraphs (1) - (4) of this subsection. The results of activities required by paragraphs (1) - (3) of this subsection may be combined to address a portion of a facility or one or more facilities of a similar nature or close proximity. The submittal shall be subject to review and approval by the executive director prior to carrying out the closure or remediation. Upon completion of the approved activity, the person shall submit the final report required by paragraph (4) of this subsection.

(1) The person shall prepare a remedial investigation report which contains sufficient documentation such as, but not limited to, descriptions of procedures and conclusions of the investigation to characterize the nature, extent, direction, rate of movement, volume, composition, and concentration of contaminants in environmental media of concern, including summaries of sampling methodology and analytical results. Information obtained from attempts to attain Risk Reduction Standard Number 1 or 2 may be submitted for this purpose.

(2) The person shall prepare a baseline risk assessment report which describes the potential adverse effects under both current and future conditions caused by the release of contaminants in the absence of any actions to control or mitigate the release. The report shall also discuss the degree of uncertainty associated with the baseline risk assessment. Residential land use with on-site exposure shall be assumed to evaluate the future use condition unless the person demonstrates to the satisfaction of the executive director that a different land use assumption such as industrial use is more appropriate. The standard exposure factors set forth in Table 1 (located following paragraph (4) of this subsection) shall be used unless the person documents to the executive director's satisfaction that site-specific exposure data should be used instead.

(3) The person shall evaluate the relative abilities and effectiveness of potential remedies to achieve the requirements for remedies described in §335.561 of this title (relating to Attainment of Risk Reduction Standard Number 3: Closure/Remediation with Controls) when considering the evaluation factors described in §335.562 of this

title (relating to Remedy Evaluation Factors for Risk Reduction Standard Number 3). Using this information, the person shall prepare a corrective measure study which recommends the remedy which best achieves the requirements for remedies described in §335.561 of this title. Persons may seek to satisfy the requirements of §335.564 of this title (relating to Post-Closure Care Not Required for Risk Reduction Standard Number 3) by demonstrating in the corrective measure study using the procedures of §335.563 of this title (relating to Media Cleanup Requirements for Risk Reduction Standard Number 3) that no remedy needs to be performed since the existing conditions of the facility or area conform to the media cleanup requirements without the use of removal, decontamination or control measures. Persons may also seek to satisfy the requirements of §335.564 of this title by demonstrating in the corrective measure study that following completion of their recommended removal and/or decontamination activities the conditions of the facility or area will conform to the media cleanup requirements of §335.563 of this title without the use of control measures. Upon review of the corrective measure study, the executive director may require the person to further evaluate the proposed remedy or to evaluate one or more additional remedies.

(4) The person shall submit to the executive director, for review and acceptance, a final report containing sufficient documentation which demonstrates that the remedy has been completed in accordance with the approved plan and also a document that the person proposes to use to fulfill the requirements of §335.566 of this title (relating to Deed Recordation for Risk Reduction Standard Number 3).
Figure: 30 TAC §335.553(b)(4) (No change.)

(c) For risk reduction standards Numbers 1, 2, and 3, in order for a treatment process to achieve decontamination in contrast to being a control measure, the person must demonstrate to the satisfaction of the executive director that the treatment process permanently alters all contaminants to levels that will not pose a substantial present or future threat to human health and the environment, and must further demonstrate that any residue remaining in place from the treatment will not pose the threat of any future release that would increase the concentrations of contaminants in environmental media above the cleanup levels determined for that particular risk reduction standard.

(d) For Risk Reduction Standards Numbers 1, 2, and 3, attainment of cleanup levels shall be demonstrated by collection and analysis of samples from the media of concern. Persons shall utilize techniques described in SW 846, Test Methods for Evaluating Solid Waste, EPA, or other available guidance in developing a sampling and analysis plan appropriate for the distribution, composition, and heterogeneity of contaminants and environmental media. A sufficient number of samples shall be collected and analyzed for individual compounds to both accurately assess the risk to human health and the environment posed by the facility or area and to demonstrate the attainment of cleanup levels. Noncompound-specific analytical techniques (e.g., total petroleum hydrocarbons, total organic carbon, etc.) may, where appropriate for the nature of the wastes or contaminants, be used to aid in the determination of the lateral and vertical extent and volume of contaminated media; however, such noncompound-specific analyses will serve only as indicator measures and must be appropriately supported by compound-specific analyses. Comparisons may be based on the following methods:

(1) direct comparison of the results of analysis of discrete samples of the medium of concern with the cleanup level;

(2) for a data set of ten or more samples, statistical comparison of the results of analysis utilizing the 95% confidence limit of the mean concentration of the contaminant as determined by the following expression:
Figure: 30 TAC §335.553(d)(2) (No change.)

(3) other statistical methods appropriate for the distribution of the data, subject to prior approval by the executive director.
Figure: 30 TAC §335.553(d)(3) (No change.)

(e) For Risk Reduction Standards Numbers 2 and 3, in determining toxicity information for contaminants (e.g., EPA carcinogen classification, type of toxicant, reference doses, carcinogenic slope factors, etc.), persons shall utilize values from the following sources in the order indicated. For Risk Reduction Standard Number 2, persons may utilize data from these sources that are more current than those used to derive the unadjusted medium-specific concentrations listed in §335.568 of this title (relating to Appendix II), provided that substantiating information is furnished to the executive director in the report required by §335.555(f) of this title (relating to Attainment of Risk Reduction Standard Number 2: Closure/Remediation to Health-Based Standards and Criteria).

(1) Integrated Risk Information System (IRIS);

(2) Health Effects Assessment Summary Table (HEAST);

(3) EPA Criteria Documents;

(4) Agency for Toxic Substances and Disease Registry (ATSDR) Toxicological Profiles; and

(5) other scientifically valid published sources.

(f) For Risk Reduction Standards Numbers 2 and 3, persons determining cleanup levels for contaminated media characterized by noncompound-specific analytical techniques (e.g., total petroleum hydrocarbons, total organic carbon, etc.) and for which individual compounds such as hazardous constituents are not present as contaminants, must at a minimum consider other scientifically valid published numeric criteria to address: adverse impacts on environmental quality; adverse impacts on the public welfare and safety; conditions that present objectionable characteristics (e.g., taste, odor, etc.); or conditions that make a natural resource unfit for use.

(g) All engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Director, Environmental Law Division
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CHAPTER 350. TEXAS RISK REDUCTION PROGRAM

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §350.1

The Texas Commission on Environmental Quality (commission) adopts an amendment to §350.1. Section 350.1 is adopted *without change* to the proposed text as published in the May 30, 2003 issue of the *Texas Register* (28 TexReg 4274) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Senate Bill (SB) 405, 77th Legislature, established the Texas Board of Professional Geoscientists and the regulation of professional geoscientists. The Texas Geoscience Practice Act (the Act) requires that a person may not take responsible charge of a geoscientific report or a geoscientific portion of a report required by state agency rule unless the person is licensed through the Texas Board of Professional Geoscientists. The primary purpose of the adopted amendment is to establish regulations for the public practice of geoscience in conformance with the Act by requiring a person who prepares and submits geoscientific information to the commission to be a licensed professional geoscientist. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. According to the bill analysis prepared at the time of passage, the ultimate purpose of the Act was public safety through the public registration of the practice of geoscience.

The adopted rule would require that engineering, geoscientific, and surveying information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer, a licensed professional geoscientist, or licensed professional surveyor and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act, the Texas Geoscience Practice Act, the Texas Professional Land Surveying Practices Act, and the licensing and registration boards under these acts. For professional engineers and professional land surveyors, this is not a new requirement. In the existing Chapter 350 rules, engineering plans, surveys, etc. have had to be prepared by professional engineers and land surveyors, although only the requirement to use a professional land surveyor (§350.111(a)(3)) was specifically stated in the rules. The adopted rule now specifically states that all engineering, geoscientific, and surveying information shall be prepared and submitted by qualified professionals as set forth by their respective licensing and registration regulations. Qualified professionals include professional geoscientists, professional engineers, and professional land surveyors.

SECTION DISCUSSION

Adopted §350.1, Purpose, adds the requirement that all engineering, geoscientific, and surveying information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer, licensed professional geoscientist, or licensed professional surveyor and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act, the Texas Geoscience Practice Act, the Texas Professional Land Surveying Practices Act, and the licensing and registration boards under these acts.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rule is to establish regulations allowing for the public practice of geoscience in agency procedures in conformance with the Act. The Act requires that a person may not take responsible charge of a geoscientific report or a geoscientific portion of a report required by a state agency rule unless the person is licensed through the Texas Board of Professional Geoscientists. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. The adopted rule is not specifically intended to protect the environment or reduce risks to human health. The adopted rule is intended to establish procedures to require that specific reports and necessary data submitted to the commission be produced, signed, sealed, and dated by licensed professional geoscientists who have obtained their licenses through the Texas Board of Professional Geoscientists. Therefore, it is not anticipated that the adopted rule will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that the adopted rule does not meet the definition of major environmental rule.

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, the amendment is not subject to Texas Government Code, §2001.0225, because it does not accomplish any of the four results specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted amendment to Chapter 350 does not meet any of these requirements. First, there are no federal standards that this rule would exceed. Second, the adopted rule does not exceed an express requirement of state law. Third, there is no delegation agreement that would be exceeded by the adopted rule. Fourth, the commission adopts this rule to allow for the public practice of geoscience in agency procedures in conformance with the Act. Therefore, the commission does not adopt the rule solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an assessment of whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific intent of the rule is to establish regulations allowing for the public practice of geoscience in agency procedures in conformance with the Act. The adopted rule would substantially advance this stated purpose by requiring that specific reports and necessary data submitted to the commission be produced, signed, sealed, and dated by licensed professional geoscientists who have obtained their licenses through the Texas Board of Professional Geoscientists.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the rule does not affect a landowner's rights in private real property by burdening private real property, nor restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise exist in the absence of the adopted rulemaking. The rule simply requires that specific portions of applications or necessary data submitted to the commission be produced, signed, sealed, and dated by a qualified professional individual who has demonstrated his or her qualifications by obtaining a license to engage in the public practice of geoscience from the Texas Board of Professional Geoscientists. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act. The adopted rule does not affect any private real property.

There are no burdens imposed on private real property, and the benefits to society are better applications for environmental permits based upon reliable reports and data submitted by qualified licensed professional geoscientists.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the construction and operation of solid waste treatment, storage, and disposal facilities, and the discharge of municipal and industrial wastewater to coastal waters. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because the adopted rule changes do not modify or alter standards set forth in existing rules, and do not govern or authorize any actions subject to the CMP. The adopted rulemaking would require a person who prepares and submits geoscientific information to the agency to be a licensed professional geoscientist. The Act also allows certain specified engineers to publicly practice geoscience in conformance with the Act.

PUBLIC COMMENT

A public hearing was not held on this rulemaking and no comments were received during the comment period, which closed June 30, 2003.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Civil Statutes, Article 3271b, the Act, which authorizes the public practice of geoscience in the State of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2003.

TRD-200304809
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: September 1, 2003
Proposal publication date: May 30, 2003
For further information, please call: (512) 239-0348

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS

SUBCHAPTER G. RESOURCES

40 TAC §3.703

The Texas Department of Human Services (DHS) adopts an amendment to §3.703, without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4842).

The amendment was undertaken to comply with the Human Resources Code, §31.032(d)(1), as amended by the 78th Texas Legislature's Senate Bill 1862, §5, and House Bill 2292, §2.201. Section 31.032(d)(1), as amended, requires DHS to reduce the current Temporary Assistance for Needy Families (TANF) resource limit of $2,000, or $3,000 if the household contains an elderly or disabled member, to $1,000.

DHS received two oral comments at a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: One commenter supported the clarification that new resource restrictions in the TANF program will not affect the treatment of resources in the Medicaid Program.

Response: DHS agrees with the comment.

Comment: A commenter expressed regret over the reduction in the TANF resource limit.

Response: DHS acknowledges the commenter's concern, but is required to adopt the amendment to comply with the Human Resources Code, §31.032(d)(1).

The amendment is adopted under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001 - 31.081.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304900

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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40 TAC §3.704

The Texas Department of Human Services (DHS) adopts an amendment to §3.704, without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4843).

The amendment was undertaken to implement House Bill 1, Rider 34, in the 78th Texas Legislature's appropriations to DHS for fiscal years 2004 and 2005. The rider instructs DHS to determine a vehicle value limit amount in determining eligibility for services that is within available appropriations and that will provide adequate, dependable transportation for clients. Lowering the resource limit for the first countable vehicle from $15,000 to $4,650 for Temporary Assistance for Needy Families-State Program (TANF-SP) clients was assumed in the funding levels allocated to DHS in the 2004 - 2005 General Appropriations Act and thus DHS needed to implement this amendment.

DHS received one written comment from the Center for Public Policy Priorities. A summary of the comment and DHS's response follow.

Comment: We suggest that DHS closely monitor the impact of this provision and collect data on the typical value of vehicles owned by TANF and TANF-SP applicants and recipients. We also suggest that DHS staff return to the DHS board with this research and recommend that this limit be set at a higher, more workable level. It may also be appropriate to include in the rule a reference to the vehicle limit being reviewed for adequacy each fiscal year.

Response: DHS agrees that it is a good idea to collect data on the typical value of vehicles owned by TANF and TANF-SP applicants and recipients, but does not believe this policy requires the adoption of a specific rule. To the extent possible, this suggestion will be included in DHS policies and procedures. DHS further agrees that updated data will be provided to the DHS board on an annual basis. DHS adopts the rule without changes.

The amendment is adopted under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001 - 31.081.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304901

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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CHAPTER 15. MEDICAID ELIGIBILITY
SUBCHAPTER E. INCOME

40 TAC §15.450

The Texas Department of Human Services (DHS) adopts an amendment to §15.450 with changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4846).

The amendment to change the personal needs allowance (PNA) was required in order to stay within the levels of funding allocated to DHS in the 2004 - 2005 General Appropriations Act. The PNA reduction from $60 to an amount set by the Commissioner of DHS of no less than $45 per month is effective September 1, 2003. For Supplemental Security Income (SSI) clients who receive the $30 federal benefit rate, the adoption changes their state supplement to an amount set by the Commissioner so they also have at least $45 for personal use.

DHS received one written comment from the Center for Public Policy Priorities (CPPP) and similar oral comments from representatives of CPPP at the Medical Care Advisory Committee meeting on July 9, 2003, and a public hearing on July 11, 2003. A representative of the Texas Legal Services Center made similar comments at the Aged and Disabled Advisory Committee meeting on August 1, 2003. A summary of the comments and DHS's responses follow.

Comment: Several commenters registered opposition to the statutory directive to reduce the PNA for nursing home residents and residents of intermediate care facilities for persons with mental retardation from $60 to $45, while recognizing that DHS had no choice in implementing the directive.

The commenters raise the issue that the PNA is the resident's only resource for the purchase of such items as clothing, toiletries, and incontinence supplies (adult diapers in excess of the limited number for which Medicaid will pay). In addition, Texas Medicaid currently intends to eliminate coverage of eyeglasses, hearing aids, services of podiatrists, and most mental health professional services, which will mean that the now-reduced PNA must also cover the costs of these items if needed. Needless to say, purchase of even an inexpensive hearing aid will likely be impossible for many residents.

Response: In consideration of funding appropriated to DHS in the 2004 - 2005 General Appropriations Act, DHS has determined that this reduction is necessary to stay within funding levels established by that act. For those individuals with applied income obligations, adjustments to the applied income payments can be requested to help pay for the items no longer covered under Medicaid, such as eyeglasses and hearing aids. However, DHS will remove the specific amount of PNA from the rule and substitute a minimum amount of $45. The amount will be set by the Commissioner. This will ensure that the PNA may be adjusted promptly if funds to do so become available.

The amendment is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment affects the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

§15.450. General Principles Concerning Income.

(a) Income does not include the value of any third-party payment for medical care or medical services furnished to a client. Income does not include the value of advice, consultation, training, or other services of strictly social nature furnished to a client.

(b) A lump sum payment is countable income in the month of receipt and is a resource thereafter.

(c) Third-party resource (TPR) reimbursements to the client (for example, from medical insurers) for a given medical service, which do not exceed the amount spent by the client for that same service, are not countable income.

(d) Refunds to a client from the Third-Party Recovery Unit, Texas Department of Health, are made when TPR payments (for example, from medical insurers) for a given medical service exceed the amount Medicaid paid for that same service. These refunds are countable income to the client upon receipt.

(e) Wages and salaries from Title V of the Older Americans Act, such as Green Thumb and Senior Texan Employment Program (STEP), are countable earned income.

(f) Amounts withheld from income as garnishment to satisfy a debt or legal obligation are countable income.

(g) Any amount refunded on income taxes already paid is not income for eligibility purposes. Income tax refunds are subject to restitution policy (in the month of receipt) for applied income purposes, to the extent that withholding tax was excluded in the applied income budget.

(h) A personal needs allowance (PNA) is an amount of a client's income that a client in an institutional setting may retain for his personal use. It will not be applied against the costs of medical assistance furnished in the facility. Clients in institutional settings and each spouse in couple cases may retain an amount of no less than $45. This amount will be set by the commissioner of DHS. For SSI clients who receive the $30 reduced federal benefit, the commissioner will set a state supplement to allow a minimum level of $45 for personal needs. The effective date of this section is September 1, 2003.

(i) A fiduciary agent is a person or organization acting on behalf of and/or with the authorization of another person. The term applies to anyone who acts in a financial capacity, whether formal or informal, regardless of his title, such as representative payee, guardian, or conservator.

(1) An action by a fiduciary agent is the same as an action by the person for whom he acts.

(2) Monies received by a client in his capacity as a fiduciary agent for someone else are not income to the client, provided the client disburses the monies to or for the benefit of the other person. If the agent is authorized to keep part of the funds as compensation for services rendered, the fees, commissions, or contributions are unearned income to the client.

(3) Monies received by a fiduciary agent for a client are charged as income to the client when received by the agent.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2003.

TRD-200304963
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) adopts amendments to §§19.216, 19.602, 19.1504, 19.1510, 19.1921, 19.2008, and 19.2116 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4847).

Justification for the amendments is to implement changes mandated by the 78th Texas Legislature. Justification for the amendment to §19.216 is to implement changes to the Health and Safety Code, §242.097, that exempt veterans homes from paying a trust fund fee. Justification for the amendment to §19.602 is to implement changes to the Health and Safety Code, §242.125, that require facility owners and employees to report abuse, neglect, or exploitation of residents to DHS. The amendment also identifies allegations or findings that must be reported to local or state law enforcement agencies. Justification for the amendment to §19.1504 is to implement changes to the Health and Safety Code, §242.603, that revises medication storage requirements. Justification for the amendment to §19.1510 is to implement changes to the Occupation Code, §562.108, that allow a U.S. Department of Veterans Affairs or other federally operated pharmacy to maintain emergency medication kits for veterans homes. Justification for the amendment to §19.1921 is to implement changes to the Health and Safety Code, §250.003, that require nursing homes and assisted living facilities to obtain criminal history checks for all employees. Justification for the amendment to §19.2008 is to implement changes to the Health and Safety Code, §242.126, that outline complaint and incident investigation procedures. Justification for the amendment to §19.2116 is to implement changes to the Health and Safety Code, §242.095, that require the Veterans Land Board to pay the fee for veterans home trustees.

DHS received no comments regarding adoption of the amendments.

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.216

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions.

The amendment implements the Health and Safety Code, §§242.001 - 242.852.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304902
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
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For further information, please call: (512) 438-3734

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SUBCHAPTER G. RESIDENT BEHAVIOR AND FACILITY PRACTICE

40 TAC §19.602

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions.

The amendment implements the Health and Safety Code, §§242.001 - 242.852.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER P. PHARMACY SERVICES

40 TAC §19.1504, §19.1510

The amendments are adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions.

The amendments implement the Health and Safety Code, §§242.001 - 242.852.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER T. ADMINISTRATION

40 TAC §19.1921

The amendment is adopted under Health and Safety Code, Chapter 250, which authorizes DHS to adopt rules on criminal history checks on persons employed by certain types of facilities.

The amendment implements the Health and Safety Code, §250.001 - 250.009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER U. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §19.2008

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions.

The amendment implements the Health and Safety Code, §§242.001 - 242.852.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER V. ENFORCEMENT DIVISION 2. LICENSING REMEDIES

40 TAC §19.2116

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions.

The amendment implements the Health and Safety Code, §§242.001 - 242.852.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER E. RESIDENT RIGHTS

40 TAC §19.405

The Texas Department of Human Services (DHS) adopts an amendment to §19.405 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4851). A correction of error in the preamble was published in the July 18, 2003, issue of the *Texas Register* (28 TexReg 5680).

Justification for the amendment is to implement the provisions of House Bill (HB) 2292, 78th Texas Legislature, which amended the Human Resources Code, §32.0321. The legislation prohibits DHS from requiring the amount of a surety bond posted for a Medicaid-certified nursing facility to exceed the average monthly balance of all the facility's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date; and, provides that if a facility employee is responsible for the loss of trust fund monies owed the facility, neither the resident, the resident's family members, nor the resident's legal representative is responsible for payment of charges due the facility. Section 19.405(g) was amended to incorporate the provisions of the legislation and to emphasize that resident trust fund accounts are specific only to the single facility purchasing a resident trust fund surety bond.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304925
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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CHAPTER 20. COST DETERMINATION PROCESS

40 TAC §20.112

The Texas Department of Human Services (DHS) adopts an amendment to §20.112 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4851).

Justification for this rule change is to ensure the Attendant Compensation Rate Enhancement system does not exceed appropriated funding levels or cause reductions to the add-on payment amounts paid to existing participating providers. The amendment, therefore, limits new community care contracted providers from participating in the Attendant Compensation Rate Enhancement and from receiving the enhanced rate add-on amounts when funds are not available. If funding becomes available to grant additional enhanced rates, new contracted providers will have the opportunity to participate in receiving enhanced rates during the subsequent open enrollment period.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Chapter 22, which authorizes DHS to administer public assistance programs.

The amendment implements the Human Resources Code, §§22.0001 - 22.038.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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CHAPTER 46. LICENSED PERSONAL CARE FACILITIES CONTRACTING WITH THE TEXAS DEPARTMENT OF HUMAN SERVICES TO PROVIDE RESIDENTIAL CARE SERVICES

The Texas Department of Human Services (DHS) adopts the repeal of §§46.1, 46.1001, 46.2001, 46.2005, 46.2006, 46.3001, 46.3005, 46.3007, 46.4004 - 46.4006, 46.5001, 46.7002, 46.8001 - 46.8003. DHS also adopts new §§46.1, 46.3, 46.11, 46.13, 46.15, 46.17, 46.19, 46.21, 46.23, 46.25,

46.27, 46.31, 46.33, 46.35, 46.37, 46.39, 46.41, 46.43, 46.45, 46.47, 46.49, 46.51, 46.53, 46.61, 46.63, 46.65, 46.67, 46.69, and 46.71, in its Contracting to Provide Assisted Living and Residential Care Services chapter.

New §§46.11, 46.35, 46.37, 46.39, 46.65, 46.67, and 46.69 are adopted with changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4852). The repeal of §§46.1, 46.1001, 46.2001, 46.2005, 46.2006, 46.3001, 46.3005, 46.3007, 46.4004 - 46.4006, 46.5001, 46.7002, 46.8001 - 46.8003; and new §§46.1, 46.3, 46.13, 46.15, 46.17, 46.19, 46.21, 46.23, 46.25, 46.27, 46.31, 46.33, 46.41, 46.43, 46.45, 46.47, 46.49, 46.51, 46.53, 46.61, 46.63, and 46.71 are adopted without changes to the proposed text.

The repeals and new sections were undertaken as part of a DHS project to rewrite agency rules in plain language format to make them easier to use and understand. The new sections also incorporate existing policy into rule language and provide clearer explanations of program policies and definitions in an effort to be as clear and unambiguous as possible. In addition, the proposal incorporates provider requirements for the Community Based Alternatives (CBA) Assisted Living/Residential Care (AL/RC) Program and the Community Care for Aged and Disabled (CCAD) RC Program into the same rule chapter, making them easier for providers and the public to access.

Justification for new §§46.3(18), 46.21(e), 46.27(c)(2)(F)(iv), 46.37, and 46.49(d)(1) is to add a room and board requirement for the CCAD RC Program. In order to meet the funding levels allocated to DHS in the 2004 - 2005 General Appropriations Act, the proposal requires clients enrolled in the CCAD RC Program to make a room and board payment directly to the facility. Adding this requirement will provide DHS with greater flexibility in funding and administering the CCAD RC Program. This will not increase the total amount of money paid by clients, but will allow this program to continue to serve the needs of enrolled clients within available funding levels.

DHS received written comments from the Texas Assisted Living Association and three individuals and additional oral comments at a public hearing on July 11, 2003. A summary of the comments and DHS's responses follow.

Comment: Several comments were received expressing concerns about freezing Title XX services. A suggestion was made that each region be allowed to commit the funds that would be needed within that region to fund Residential Care and have the flexibility within that region to shift money between programs and avoid a statewide freeze.

Response: The comment does not directly address a proposed rule so there is no change to a rule. DHS is looking at flexibility in providing Title XX services, which would allow provision of residential care services to people in this environment.

Comment: DHS received a general comment regarding receipts, ledgers, and other bookkeeping documentation. DHS was asked to confirm that facilities may maintain bookkeeping records in a computerized format so long as the records otherwise conform to these regulations.

Response: Sections §46.37(d) and §46.37(e) already use the language "in any format" in reference to documentation requirements. DHS revises §46.67(a)(1) to state that written records may be in any format.

Comment: Concerning §46.11(b)(2), a comment was received stating that current DHS policy allows for multiple facilities to be on the same contract. The commenter appears to be concerned that DHS is changing the contracting practice in this program.

Response: This is not a change in current practice. DHS will continue to use the same contract procedures. DHS adopts the paragraph without change.

Comment: Concerning §46.11(d)(3), a commenter suggested that paragraph (3) may not be necessary because designated rooms are not required by rule.

Response: DHS agrees and deletes this paragraph because the rules no longer require designated rooms.

Comment: In regards to §46.11(d)(4), a concern was expressed that calling an IDT meeting before refusing a referral would bottleneck the system.

Response: The facility contracts to provide services to clients who are the focus of the program. DHS recognizes that a facility may not be able to serve a client. The IDT Meeting is necessary to ensure all options for the client are explored prior to the facility refusing to accept a referral. DHS adopts the paragraph without change.

Comment: Concerning §46.21(h), comments were received expressing concerns that a facility must bill the double occupancy (Residential Care Apartment) rate for clients in the single occupancy (Assisted Living Apartment) setting who request double occupancy. Commenters would also like the clients currently sharing an apartment be "grand fathered" in at the single occupancy rate.

Response: The Health and Human Services Commission (HHSC) rate setting division is responsible for determining the rates for DHS programs. Per HHSC rate setting "The double occupancy rate should be used for all double occupancy situations. The double occupancy rate charged for the two residents is the intended payment rate for the provider, not the single occupancy rate charged for two residents." HHSC rate setting also states the current clients cannot be "grand fathered" in and must be billed using the proper rate effective September 1, 2003. DHS adopts this section without change.

Comment: In regards to §46.23(2), concerns have been expressed about sanctions based on fiscal monitoring, particularly when the errors are simple mistakes, such as the errors contemplated by subpart (B) and regarding the 12% administrative penalty for simple isolated errors.

Response: The 12% sanction is the administrative portion of the rate. Administrative errors are designed to review service delivery documentation for correct completion of the service delivery records to support billing. The errors listed in §46.23(2)(B)(i) - (xi) are critical to the correct completion of the service delivery documentation. Fiscal monitoring, both administrative and financial errors, is designed to review the documentation that supports service delivery and billing. DHS adopts this subsection without change.

Comment: Concerning §46.35, a commenter expressed concern about the three-day timeframe to convene the Interdisciplinary Team (IDT). One commenter proposed additional language for the rule.

Response: DHS agrees with the comment. DHS accepts the proposed language, with minor stylistic changes, allowing the facility to convene an IDT meeting if all the members are not available to attend the meeting. DHS also adds language that requires the documentation of an IDT meeting without all the IDT

members be sent to the Regional Administrator for review. This will ensure the proper DHS staff review the documentation and take the appropriate action.

Comment: In regards to §46.35, a question was asked if sharing health information during an IDT Meeting would be exempt from the consent and authorization requirements of the Health Insurance Portability and Accountability Act (HIPAA).

Response: DHS believes that facilities are able to comply with both the IDT meeting requirements and the HIPAA privacy rules. Because the IDT meets to discuss service delivery issues, DHS believes that an IDT meeting will usually qualify as a "treatment" activity of the facility under the HIPAA privacy rules. If an IDT meeting qualifies as a "treatment" activity of the facility, the HIPAA privacy rules give the facility the option of getting the client's consent to use or disclose protected health information for this activity. Under these circumstances, the facility is not required to get an authorization from the client to use or disclose protected health information. However, DHS cannot conclude that IDT meetings will always qualify as treatment activities of the facilities. Whether they will qualify as treatment activities of the facilities will depend on the precise purpose of the meeting and, perhaps, who attends the meeting. Furthermore, DHS is not responsible for enforcing the HIPAA privacy rules. Facilities should consult with their own privacy officers and lawyers to determine when they should get consents or authorizations to use or disclose protected health information. DHS is not changing this section in response to this comment.

Comment: Concerning §46.37(c)(2) comments were received expressing many concerns about this subsection. The commenters state the rule does not address those instances when a client or client's representative is unable or unwilling to be contacted, and conflicts with monthly billing cycles and statements. Concerns were also expressed about credit balance refunds. One of the commenters provided some alternative language for §46.37(c)(2).

Response: DHS accepts the proposed language with minor stylistic changes and changes the paragraph. The commenter also suggested five days for the client or the client's representative to respond in §46.37(c)(2)(C). DHS believes this is not enough time, and changes this to 35 days. This allows the client or the representative more time to respond to the notice.

Comment: Concerning §46.37(d)(3), a request was made to not require the payment details on the receipt, if those details are on the copayment and room and board ledger. The commenter requested the facilities be allowed to receipt how much money was paid and then post to the ledger, with the ledger reflecting all charges, credits, and payments per GAAP standards.

Response: DHS agrees, and revises the paragraph to state "Copayment and room and board receipts must contain the following elements if the elements are not contained in the copayment and room and board ledger described in subsection (e) of this section."

Comment: In regards to §46.37(e)(3), a request was made to allow 35 days for ledger entries to be completed.

Response: DHS agrees, and revises §46.37(e)(3) to allow 35 days or by the next billing cycle, whichever is sooner.

Comment: In regard to §46.37(f), several commenters requested deadline be changed to 10 working days. This will give providers a little more time to issue refund checks.

Response: DHS agrees, and changes the deadline to 10 working days.

Comment: In regards to §46.39(d)(3)(B), DHS received several comments stating that assisted living facilities do not have nurses on staff. The commenters would "just like to retain the flexibility that we have under our licensing standards to not have to hire facility nurses to simply do assessments."

Response: DHS does not require the nurse to be a facility employee. DHS revises the rule language in §46.39(d)(3)(B) to clarify that the nurse who completes the medication administration portion of the assessment does not have to be a facility employee.

Comment: In regards to §46.39(d)(3)(B), several comments were received regarding the number of assessments completed for a CBA AL/RC client. The commenters state they feel the three assessments required for CBA AL/RC are duplicative. The commenters would like to "pare it down to where we can limit the redundant assessments."

Response: There are three separate assessments required for a CBA AL/RC client, all serving different purposes and collecting different information. Form 3652 is done as a part of determining client eligibility for the CBA program, and is not a service plan. The HCSS agency completes an assessment that is a service agreement between the HCSS agency and the client, and includes the services the HCSS agrees to provide to the client. The assisted living facility needs to complete an assessment to develop a service agreement between the client and the assisted living facility. This assessment can be used to fulfill the need for an assessment required by licensure. DHS may review consolidation of the assessments in the future. DHS is not changing this subparagraph in response to this comment.

Comment: In regards to §46.39(d)(3)(B), concerns have been expressed regarding the use of a nurse to complete or sign-off on the medication administration portion of the assessment for CBA AL/RC clients. The comments refer to assisted living licensure regulations in 40 TAC §92.41(e). This item does not allow an assisted living facility to "admit or retain." an individual who requires the services of facility employees who are licensed nurses on a daily or regular basis." Another commenter stated that the intent of the "Medications" section "is for facility staff to determine if the resident is able to Self-Administer Medications."

Response: A CBA AL/RC facility is required to provide administration of medications at the level that meets the client's needs as a part of the CBA AL/RC program. The rate for CBA AL/RC includes payment for administration of medication. Administration of medications does not violate §92.41(e). Assisted living facilities are required by statute and rules to provide personal care. The statutory definition of personal care includes the administration of medication. A registered nurse must assess what level of assistance a client needs with medication, and develop a plan of care for medication administration. If the client is unable to self-medicate, the registered nurse must ensure the plan of care for administration of medications is followed. DHS is not changing this subparagraph in response to this comment.

The intent of Section III, Part A, Item 5 of Form 3050 is to determine what level of assistance a client needs with his medications. The CCAD RC Program only allows assistance with self-administered medications. However, the CBA AL/RC Program requires the facility to provide whatever level of medication assistance the client needs, including direct administration of medications.

Therefore, for the CBA AL/RC program, the "Medications" section of Form 3050 is to determine how much assistance the client needs with his medications, and a nurse must complete this portion of the assessment.

Comment: In regards to §46.63(d), comments were received requesting a rule change to allow the facility to apply interest earned on a trust fund account to the banking fees on the account. The comments stated that this would be consistent with the Federal SNF guidelines.

Response: Language in this section was patterned after Medicaid Nursing Facility trust fund rules. Banking fees from joint accounts and facility-choice individual accounts are the responsibility of the facility. Banking fees on a client-choice individual account are the responsibility of the client. DHS adopts this section without change.

Comment: Concerning §46.65(d)(7), a request was made to allow petty cash fund reconciliation monthly, as opposed to every 14 days. Comments received state many clients who utilize trust funds pay their bills from their trust fund account, and then get their remaining monthly income as cash from the petty cash fund early in the month. Therefore there is no further activity in the petty cash fund.

Response: DHS agrees, and revises the paragraph.

Comment: In regards to §46.69(b), a request was made to delete the requirement to refund any interest accrued when the trust fund is refunded. Comments received state that the trust fund rules only require the facility to post interest when the bank pays the interest.

Response: DHS agrees, and revises the subsection to state that this refund must include any interest reported as of the date of the request.

SUBCHAPTER A. SCOPE

40 TAC §46.1

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DEFINITIONS

40 TAC §46.1001

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER C. PROVIDER PARTICIPATION

40 TAC §§46.2001, 46.2005, 46.2006

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER D. CLAIMS PAYMENT

40 TAC §§46.3001, 46.3005, 46.3007

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER E. PROVIDER CONTRACTS

40 TAC §§46.4004 - 46.4006

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER F. RECORDS

40 TAC §46.5001

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER G. SUPPORT DOCUMENTS

40 TAC §46.7002

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal affects the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER H. ADMINISTRATIVE AND FINANCIAL ERRORS

40 TAC §§46.8001 - 46.8003

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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CHAPTER 46. CONTRACTING TO PROVIDE ASSISTED LIVING AND RESIDENTIAL CARE SERVICES

SUBCHAPTER A. INTRODUCTION

40 TAC §46.1, §46.3

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

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SUBCHAPTER B. PROVIDER CONTRACTS

40 TAC §§46.11, 46.13, 46.15, 46.17, 46.19, 46.21, 46.23, 46.25, 46.27

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

§46.11. Contracting Requirements.

(a) General contracting requirements. A facility must meet all provisions described in this chapter and Chapter 49 of this title (relating to Contracting for Community Care Services).

(b) Assisted living services contracting requirements. To qualify to provide assisted living services under contract with the Texas Department of Human Services (DHS), a facility must comply with the following requirements:

(1) The facility must be licensed as defined in §92.4 of this title (relating to Types of Assisted Living Facilities). The facility must be allowed under licensure to provide the required services described in §46.41 of this chapter (relating to Required Services). Due to the licensure requirements, Type C and Type E facilities are not able to provide the required services under this chapter.

(2) The facility must have a separate contract for each facility that provides assisted living services.

(3) The facility must specify the number of beds for DHS clients in its contract, as follows:

(A) The facility must ensure that the number of beds contracted are in rooms that meet the requirements in §46.13 of this chapter (relating to Housing Options).

(B) The facility must ensure the number of DHS clients served by the facility does not exceed the number of contracted DHS beds.

(C) The facility may adjust the number of beds for DHS clients by contract amendment.

(4) The facility must comply with all other applicable DHS rules and regulations.

(c) Disclosure statement requirements. The facility must ensure that the Assisted Living Disclosure Statement, as required by Chapter 92 of this title (relating to Licensing Standards for Assisted Living Facilities), does not conflict with the program requirements.

(d) Client referrals. The facility must accept all DHS referrals unless:

(1) the referral would cause the facility to exceed licensed capacity;

(2) the referral would cause the facility to exceed the number of beds for DHS clients that the facility has specified in its contract; or

(3) the facility is unable to meet the client's needs and has followed the procedures described in §46.35 of this chapter (relating to Interdisciplinary Team).

(e) Contract assignment. In addition to the procedures described in §49.5 of this title (relating to Contract Assignment), the facility must follow the procedures described in §46.71 of this chapter (relating to Trust Fund Procedures for Client Discharge) for assignment of the trust fund account and records.

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SUBCHAPTER C. PROVIDER REQUIREMENTS

40 TAC §§46.31, 46.33, 46.35, 46.37, 46.39, 46.41, 46.43, 46.45, 46.47, 46.49, 46.51, 46.53

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and

Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

§46.35. Interdisciplinary Team.

(a) Interdisciplinary Team (IDT). The IDT is a designated group that includes the following individuals who meet when the need arises to discuss service delivery issues:

(1) the client or the client's representative, or both;

(2) a facility representative; and

(3) a Texas Department of Human Services (DHS) representative. A DHS representative may be:

(A) the case manager (or designee);

(B) the contract manager (or designee); or

(C) the regional nurse (or designee).

(b) Convening an IDT meeting.

(1) The facility must convene an IDT meeting within three working days of the date the facility identifies a service delivery issue.

(2) If the facility is unable to convene an IDT meeting with all the members described in subsection (a) of this section, the facility must send the documentation of the IDT meeting described in subsection (e) of this section to the Regional Administrator for the DHS region in which the client resides.

(A) The documentation must be sent within five working days of the date of the IDT meeting.

(B) Further action may be required by the facility, based on a review of the IDT meeting documentation.

(c) IDT meeting.

(1) The IDT meeting may be conducted by telephone conference call or in person.

(2) The IDT must:

(A) evaluate the issue;

(B) identify any solutions to resolve the issue; and

(C) make recommendations to the facility.

(d) IDT meeting outcome. The facility must do one of the following within two working days after the IDT meeting:

(1) implement the recommendations of the IDT; or

(2) discharge the client from the facility and refer the case back to the case manager for referral to another facility.

(e) Documentation of the IDT meeting. The facility must document the IDT meeting in the client file, including the:

(1) specific reasons for calling the IDT meeting;

(2) participants of the IDT meeting. If all members described in subsection (a) of this section are unable to participate, the facility must document all efforts made to convene an IDT meeting with all the members;

(3) recommendations of the IDT;

(4) efforts made to resolve the issue;

(5) facility's action as a result of the IDT recommendations; and

(6) reasons for the facility's actions.

§46.37. Copayment and Room and Board.

(a) Amount. The facility must collect the copayment and room and board amounts indicated on the Texas Department of Human Services' (DHS's) Notification of Community Care Services form or DHS's Notification of Community Based Alternatives (CBA) Services form. This subsection does not apply to clients who receive Community Care for Aged and Disabled emergency care service.

(b) Due date.

(1) The facility must designate a due date for copayment and room and board in writing. The due date must be during the same month the copayment and room and board is applied.

(2) The facility must collect the entire copayment and room and board on or before the due date. If the due date falls on a weekend or a holiday, the facility must collect the entire copayment and room and board on or before the first working day thereafter.

(3) If the client or the client's representative fails to pay the entire copayment and room and board by the due date, the facility must notify the client or the client's representative and the case manager in writing no later than the first working day after the due date.

(c) Credit balances.

(1) A credit balance is an amount due to the client or the client's representative when there is an overpayment by the client or the client's representative.

(2) The facility must handle credit balances as follows:

(A) The facility must provide written notice of a credit balance (client notice) to the client or the client's representative within 35 days of receipt of the payment resulting in a credit balance. The client notice may be the first monthly statement following the receipt of the payment resulting in a credit balance, if the monthly statement specifies the credit balance.

(B) The facility must offer the client or the client's representative the following options in the client notice:

(i) the client or the client's representative may choose to provide the corrected payment, and the facility will return the original amount paid;

(ii) the facility will provide the client or the client's representative with a refund of the credit balance; or

(iii) the client or the client's representative may choose to have the credit balance applied to the following month's payment. The client may choose to spread the credit balance over several months.

(C) If the client or the client's representative fails to contact the facility within 35 days of the date of the client notice, the facility must, on the 35th day:

(i) provide the client or the client's representative with a refund of the credit balance or apply the credit balance to the following month's payment; and

(ii) provide written notice of the facility's choice of action to the client or the client's representative. The written notice of the facility's choice of action may be a monthly statement if the monthly statement specifies the facility's choice of action.

(d) Copayment and room and board receipts.

(1) The facility must provide receipts for all copayment and room and board payments received from or on behalf of clients at the time the payment is received.

(2) The facility must keep a copy of all copayment and room and board receipts.

(3) Copayment and room and board receipts must contain the following elements if the elements are not contained in the copayment and room and board ledger described in subsection (e) of this section:

(A) the name of the client;

(B) the month, day, and year the payment was received;

(C) the total amount collected;

(D) the specific amounts of copayment and room and board collected; and

(E) the month and year of the coverage period for the payment received.

(4) Copayment receipts may be in any format.

(e) Copayment and room and board ledger. The facility must maintain a copayment and room and board ledger system in any format for each client.

(1) The facility may keep the copayment and room and board ledger systems as separate ledgers, or the facility may combine both ledgers into a single ledger system. If the facility chooses to keep a single ledger system, a separate entry must be made for each copayment and room and board entry.

(2) The copayment and room and board ledger system must reflect the following:

(A) all charges for copayment and room and board by client;

(B) all payments for copayment and room and board made by or on behalf of a client;

(C) all credits for copayment and room and board by client, including the:

(i) specific amount credited;

(ii) month and year of the coverage period of the credit;

(iii) type of payment credited; and

(iv) reason for the credit; and

(D) a running balance by client.

(3) The facility must record all activities on the copayment and room and board ledger system within 35 days or by the next billing cycle, whichever is sooner.

(4) The copayment and room and board ledger must be maintained in accordance with generally accepted accounting principles (GAAP).

(f) Refunds upon discharge. The facility must refund the client's copayment and room and board for the remaining days of the month following the date of discharge or death. The refund must be made within ten working days of awareness that the client will be discharged or is deceased. The facility must document the date of awareness of the client's discharge from the facility.

§46.39. Service Initiation.

(a) Negotiated move-in date. The facility must negotiate a move-in date with the Texas Department of Human Services (DHS) case manager and the client or the client's representative.

(b) Reserved space. The facility must reserve a living unit for three days from the agreed upon move-in date for each referred client. The facility may request another referral after three days if the move-in date is not re-negotiated.

(c) Client and facility agreement. The facility must have a written agreement with the client or the client's representative. Both parties must sign the written agreement before or at the time of admission. The written agreement must include the following:

(1) bedhold policies for hospital and nursing facility stays;

(2) personal leave policies and charges;

(3) eviction procedures;

(4) all available services in the facility; and

(5) charges for services not paid by DHS and charges not included in the facility's basic daily rate, as described in §46.15 of this chapter (relating to Additional Services and Fees).

(d) Health assessment and service plan.

(1) The facility must complete a health assessment and develop an individual service plan as described in §92.41(c) of this title (relating to Standards for Type A, Type B, and Type E Assisted Living Facilities).

(2) In addition to the items described in §92.41(c) of this title, the health assessment developed by the facility must contain the following items:

(A) vision patterns;

(B) skin conditions;

(C) body control problems; and

(D) vital signs, height, and weight.

(3) The health assessment and individual service plan must be completed:

(A) within 72 hours of admission to the facility; and

(B) by the appropriate person(s).

(i) The facility manager or a nurse must complete the health assessment and individual service plan.

(ii) A nurse must complete the medication administration portion of the health assessment for Community Based Alternatives (CBA) Assisted Living/Residential Care (AL/RC) clients. If the nurse is a licensed vocational nurse (LVN), a registered nurse (RN) must sign off on the medication administration portion of the health assessment.

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SUBCHAPTER D. TRUST FUNDS

40 TAC §§46.61, 46.63, 46.65, 46.67, 46.69, 46.71

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

§46.65. Trust Fund Transactions.

(a) Transactions.

(1) The facility must keep records of all trust fund transactions.

(2) Facility staff must record on the client's trust-fund ledger or deposit/withdrawal document at least the following:

(A) the date and amount of each deposit;

(B) the source of each deposit;

(C) the date and amount of each withdrawal;

(D) the reason for each withdrawal;

(E) the name of the person or entity who accepted the withdrawn funds; and

(F) the balance after each transaction.

(3) The client or the client's representative must sign for each withdrawal transaction at the time of the transaction.

(A) The signature must be on the trust-fund ledger, deposit/withdrawal document, or trust fund receipt.

(B) At least one witness must sign for each withdrawal transaction if the client or the client's representative cannot sign.

(C) A signature is not required if the payment meets the definition of a recurring payment as described in subsection (c) of this section.

(4) The facility must record transactions within 14 days of occurrence.

(b) Bulk purchases. The facility may make bulk purchases for items used by multiple clients.

(1) The bulk purchase must be traceable to individual clients.

(2) The receipt for the bulk purchase must show the following:

(A) the names of the clients for whom the purchase was made; and

(B) the portion of the total price charged to each client.

(3) The facility must not charge the client or the client's representative more than the actual cost of the client's portion of items that are purchased in bulk.

(c) Recurring payments.

(1) The facility must obtain the client's or the client's representative's written request and authorization to make recurring payments on behalf of the client. The written authorization must include the:

(A) name of the business or entity to which the recurring payment is made;

(B) amount of the recurring payment. If the recurring payment is not a set amount, the authorization must include the method for determining the amount of the recurring payment;

(C) date the payment will begin; and

(D) signature and signature date of the client or the client's representative.

(2) The client or the client's representative must request and authorize the facility to stop recurring payments on behalf of the client.

(A) The authorization may be oral or written.

(B) The facility must document the request, including the:

(i) name of the business or entity to which the recurring payment is made; and

(ii) date the payment will stop.

(3) The facility is not required to have a receipt for recurring payments made on behalf of the client.

(d) Petty cash fund.

(1) A petty cash fund is part of the pooled checking account trust fund kept on hand in cash by the facility. The petty cash fund is used for disbursement to clients for the purchase of minor items.

(2) The facility must keep the petty cash fund locked.

(3) The facility must set a dollar limit for petty cash transactions.

(A) The facility must document:

(i) the dollar limit of petty cash transactions; and

(ii) a list of any exceptions to the petty cash transaction limit, if applicable.

(B) The facility must follow the procedures in subsection (a) of this section for withdrawals that exceed the petty cash transaction limit.

(4) The facility must keep records of all petty cash fund transactions. The petty cash fund record must be a:

(A) petty cash fund ledger; or

(B) petty cash fund receipt.

(5) A petty cash fund ledger or receipt must include the:

(A) name of the client;

(B) date of the withdrawal;

(C) amount of the withdrawal; and

(D) signature of client or the client's representative, or at least one witness if the client or the client's representative cannot sign.

(6) The facility must use the following guidelines to replenish the petty cash fund:

(A) Count the money in the petty cash fund.

(B) Determine the difference between amount in the petty cash fund and the amount needed in the petty cash fund.

(C) Cash a check for the difference between the amount in the petty cash fund and the amount needed in the petty cash fund.

(i) Write the check for cash on the appropriate checking account, either the:

(I) pooled trust fund checking account; or

(II) individual client trust fund checking account.

(ii) Indicate "petty cash fund" in the "memo" line of the check.

(D) Put the cash in the petty cash fund.

(7) The facility must reconcile the petty cash fund at least monthly.

(8) The facility must follow the requirements for transactions in subsection (a) of this section to post petty cash fund transactions to the trust fund ledger. However, the client's or the client's representative's signature is not required on the trust fund ledger or trust fund receipt if the client's or the client's representative's signature is on the petty cash fund ledger or receipt.

(e) Receipts.

(1) A trust fund receipt is required when a direct payment is made from the client's trust fund. The facility may use printed receipts from vendors as trust fund receipts only if:

(A) all elements from paragraph (4) of this subsection are present; or

(B) any missing elements from paragraph (4) of this subsection are added.

(2) A trust fund receipt is required when a payment is received by the facility on behalf of a client. This is not applicable to funds direct-deposited to the trust fund account.

(3) A trust fund receipt is not required when the client or the client's representative makes a direct purchase with funds withdrawn from the trust fund. The withdrawn funds must meet the requirements listed in subsection (a) of this section.

(4) A trust fund receipt must contain the:

(A) name of the client;

(B) month, day, and year the receipt was written or created;

(C) total amount of money spent or received for the client;

(D) specific item(s) purchased; and

(E) name of the business or entity from which the purchase was made or the payment received.

(5) A trust fund receipt may contain the signature of the client or the client's representative for payments made from the trust fund. At least one witness must sign for each payment made if the client or the client's representative cannot sign.

(f) Limitations on withdrawals. The facility must not use the client's personal funds to purchase any item or service that the Texas Department of Human Services requires the facility to provide. The facility must purchase additional items or service with the client's personal funds only as described in §46.15 of this chapter (relating to Additional Services and Fees).

§46.67. Trust Fund Documentation.

(a) Accounting and records.

(1) The facility must keep written records of all financial transactions involving the client's personal funds that the facility is holding, safeguarding, and accounting. The written records may be in any format.

(2) The facility must keep the accounting records in accordance with generally accepted accounting principles (GAAP).

(3) The facility must keep records in accordance with its fiduciary duties for client trust funds.

(4) The facility must include at least the following in the accounting records:

(A) each client's name;

(B) identification of each client's representative or person assigned to receive the client's income, if any;

(C) admission date;

(D) each client's earned interest, if any;

(E) documentation of each transaction; and

(F) receipts for purchases and payments, including cash register tapes or sales statements from a seller.

(b) Quarterly statement. The facility must provide quarterly statements to the client or the client's representative, as described in §92.125(a)(3)(L) of this title (relating to Resident's Bill of Rights and Provider Bill of Rights).

(c) Access to trust fund records.

(1) The facility must make an individual client's financial record and supporting documents available at any time during working hours to the client, the client's representative, and the Texas Department of Human Services.

(2) This review can be made without prior notification.

§46.69. Trust Fund Refunds.

(a) The facility must return the full balance of the client's personal funds held in the facility to the client or the client's representative immediately upon request if the request is made during normal business hours. For purposes of this subsection, normal business hours are 8:00 a.m. to 5:00 p.m. on working days, or at the beginning of the next normal business hours if the request is received during hours other than normal business hours.

(b) The facility must return the full balance of the client's personal funds that the facility has deposited in any bank account to the client or the client's representative within ten working days of request. This refund must include any interest reported as of the date of the request.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304946
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED

SUBCHAPTER F. IN-HOME AND FAMILY SUPPORT PROGRAM

40 TAC §§48.2705, 48.2707, 48.2708

The Texas Department of Human Services (DHS) adopts amendments to §§48.2705, 48.2707, and 48.2708 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4876).

In consideration of funding appropriated to DHS through the 2004 - 2005 General Appropriations Act, DHS has determined to reduce the amount of cash assistance to clients in the In-Home and Family Support Program (IH/FSP). Changes to §48.2705 provide the framework by which this can be accomplished by allowing DHS to set IH/SFP grant amounts within a range of zero to $3,600. Amendments to §48.2707 and §48.2708, which revise procedures for receipt reconciliation and subsidy issuance, were made to assist DHS regions in distributing and managing a reduced budget so that the program could continue to serve clients within the appropriated funding levels.

DHS received no comments regarding adoption of the amendments.

The amendments are adopted under the Human Resources Code, Chapters 22 and 35, which authorizes DHS to administer public assistance programs and provide support services to persons with disabilities.

The amendments implement the Human Resources Code, §§22.0001 - 22.038 and §§35.001 - 35.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304910
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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SUBCHAPTER H. ELIGIBILITY

40 TAC §48.2920

The Texas Department of Human Services (DHS) adopts an amendment to §48.2920, without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4878).

Justification for this amendment is to provide DHS with greater flexibility in funding and administering the Community Care for Aged and Disabled (CCAD) Residential Care (RC) Program. In order to stay within the levels allocated to DHS in the 2004-2005 General Appropriations Act, the amendment requires clients enrolled in the CCAD RC Program to make a room and board payment directly to the facility. This will not increase the total amount of money paid by clients, but will allow the program to continue to serve the needs of enrolled clients within available funding levels.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Chapter 22, which authorizes DHS to administer public assistance programs.

The amendment implements the Human Resources Code, §§22.0001 - 22.038.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304911
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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CHAPTER 79. LEGAL SERVICES

The Texas Department of Human Services (DHS) adopts amendments to §§79.1917, 79.2001, and 79.2003 in its Legal Services chapter. DHS adopts the amendments to §79.1917 and §79.2003 with changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4879). DHS adopts the amendment to §79.2001 without changes to the proposed text.

Justification for the amendments is to implement the provisions of House Bill (HB) 2292, 78th Texas Legislature, which amended the Government Code, §531.114. HB 2292 changed the definition of an intentional program violation and the disqualification time frames for the Temporary Assistance for Needy Families (TANF) Program. The adoption provides: (1) the definition of an intentional program violation in the TANF Program; (2) disqualification periods imposed when a client commits an intentional program violation; and (3) the remedy for an Administrative Disqualification Determination as mandated by the legislature.

DHS received one written comment from an individual. A summary of the comment and DHS's response follow.

Comment: The proposed changes to §79.1917 create not only judicial review for TANF disqualification decisions, but also for

Food Stamp Program disqualification decisions. It is my understanding that HB 2292 only authorizes judicial review for TANF disqualifications. Therefore, DHS should not enact a rule that goes beyond what was intended by the legislature.

Response: DHS added language to §79.1917(c)(2) to clarify that decisions in TANF cases may be appealed through judicial review.

DHS has initiated a minor editorial change to the text of §79.2003 to correct punctuation.

SUBCHAPTER T. ADMINISTRATIVE FRAUD DISQUALIFICATION HEARINGS

40 TAC §79.1917

The amendment is adopted under Human Resources Code, Chapters 31 and 33, which authorizes DHS to administer financial assistance programs and to administer nutritional assistance programs.

The amendment implements the Human Resources Code, §§31.001 - 31.081 and §§33.001 - 33.027.

§79.1917. Effect of an Administrative Determination of Intentional Program Violation.

(a) If a hearing officer finds that a household member committed an intentional program violation, the household member is disqualified from the Food Stamp and/or Temporary Assistance for Needy Families (TANF) programs for the following periods.

(1) TANF. If the intentional program violation occurred on or after September 1, 2003, the person is disqualified:

(A) 12 months for the first intentional program violation determination; and

(B) permanently for the second intentional program violation determination.

(2) Food Stamps. The person is disqualified:

(A) for a period of one year upon the first occasion of any such determination;

(B) for a period of two years upon:

(i) the second occasion of any such determination; or

(ii) the first occasion of a finding by a federal, state, or local court of the trading of a controlled substance (as defined in Title 21, United States Code (USC), §802) for coupons; and

(C) permanently upon:

(i) the third occasion of any such determination; or

(ii) the second occasion of a finding by a Federal, state, or local court of the trading of a controlled substance (as defined in Title 21, USC, §802) for coupons; or

(iii) the first occasion of a finding by a federal, state, or local court of the trading of firearms, ammunition, or explosives for coupons; or

(iv) conviction of the offense of knowingly receiving, transferring, acquiring, altering, or possessing coupons, authorization cards, or access devices in any manner contrary to the Food Stamp Act of 1977 involving an aggregate amount of $500 or more.

(D) for a period of ten years if a person is convicted in a state or federal court or is found by a state administrative hearing to have made a fraudulent statement or representation with respect to the identification or place of residence of the individual, in order to receive multiple benefits simultaneously under the Food Stamp Program.

(b) The disqualification period does not depend upon the amount of benefits involved. The disqualification period set at the time of the hearing is applicable regardless of current eligibility.

(c) The decision of the hearing officer in the Administrative Disqualification Hearing is final. The household member:

(1) may not have this decision reversed by a subsequent Administrative Disqualification Hearing; and

(2) for purposes of TANF decisions, may appeal that determination by filing a petition in the district court in the county in which the violation occurred not later than the 30th day after the date the hearing officer made the determination.

(d) If one hearing is held for several offenses, the Texas Department of Human Services may impose only one disqualification period.

(e) If the hearing officer imposes a one year disqualification for an initial violation, no further disqualifications may be imposed for violations occurring before the hearing decision that are later discovered. These violations may be brought to the hearing officer and, if appropriate, an intentional program violation may be found.

(f) Although the hearing officer's decision regarding the intentional program violation is final, the appellant may appeal the investigator's computation of the amount of overpayment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304912
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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SUBCHAPTER U. FRAUD INVOLVING RECIPIENTS

40 TAC §79.2001, §79.2003

The amendments are adopted under Human Resources Code, Chapters 31 and 33, which authorizes DHS to administer financial assistance programs and to administer nutritional assistance programs.

The amendments implement the Human Resources Code, §§31.001 - 31.081 and §§33.001 - 33.027.

§79.2003. Determination and Disposition of Intentional Program Violations.

(a) The Texas Department of Human Services (DHS) determines the existence of intentional program violations; refers cases for investigation, administrative hearings, and prosecution; takes collection action and ensures clients' rights according to applicable Texas criminal statutes and the following:

(1) Temporary Assistance for Needy Families (TANF)--as provided in:

(A) Personal Responsibility and Work Opportunity Act (42 U.S.C. §601 et. seq.);

(B) Human Resources Code, Chapter 31; and

(C) Government Code, §531.114;

(2) Food Stamp Program--7 Code of Federal Regulations, §§273.16 - 273.18; and

(3) Medicaid Program--42 Code of Federal Regulations, §455.2 and §455.16.

(b) Individuals found to have committed an intentional program violation in the food stamp and/or TANF programs through an administrative disqualification hearing or who have signed a waiver of right to an administrative disqualification hearing are subject to the disqualification periods outlined in §79.1917 of this title (relating to Effect of an Administrative Determination of Intentional Program Violation).

(c) If a person is convicted of a state or federal offense for conduct, as described in §79.2001(c) of this title (relating to Terms and General Policy), and such conduct is committed on or after September 1, 2003, or if the person is granted deferred adjudication or placed on community supervision for that conduct, the person is permanently disqualified from receiving financial assistance.

(d) Individuals found to have committed an intentional program violation in the Food Stamp Program by a court of appropriate jurisdiction, or on the basis of a plea of nolo contendere or otherwise in cases referred for prosecution in state or federal court, are subject to the disqualification periods outlined in §79.1917(a) of this title.

(e) In TANF cases, DHS does not take the needs of the disqualified individual into account during the period he is disqualified when determining the assistance unit's need and amount of assistance. DHS considers any resources and income of the disqualified individual as available to the assistance unit. DHS does not disqualify an individual from the TANF program unless the overissuance of benefits resulting from the intentional violation occurred in the month of October 1988 or later.

(f) Disqualified individuals are ineligible for TANF Medicaid benefits during the disqualification period. However, they may qualify for and receive benefits under provisions of Chapter 2 of this title (relating to Medically Needy and Children and Pregnant Women Programs).

(g) A household member may be charged with an intentional program violation even if he has not actually received benefits to which he is not entitled.

(h) The amount of the intentional program violation claim must be calculated back to the month the act of intentional program violation occurred, regardless of the length of time that elapsed until the determination of intentional program violation was made. However, DHS must not include in its calculation any amount of the overissuance that occurred in a month more than six years from the date the overissuance was discovered for food stamp cases.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304913
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §90.19

The Texas Department of Human Services (DHS) adopts an amendment to §90.19 without changes to the proposed text published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4881).

Justification for the amendment is to clarify in DHS's rules that the quality assurance fee for intermediate care facilities for persons with mental retardation (ICF/MR) established in Health and Safety Code, Chapter 252, now applies to state schools in accordance with House Bill 2292 and Senate Bill 1862, 78th Texas Legislature. Under Health and Safety Code, §252.205, rules related to the actual imposition and collection of the quality assurance fee are the responsibility of the Health and Human Services Commission.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Health and Safety Code, Chapter 252, which authorizes DHS to license and regulate intermediate care facilities for persons with mental retardation or related conditions.

The amendment implements the Health and Safety Code, §252.202(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2003.

TRD-200304914
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2003
Proposal publication date: June 27, 2003
For further information, please call: (512) 438-3734

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

Notice is given that the Commissioner of Insurance will consider a proposal made in a staff petition which seeks amendments of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2002 and 2003 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0803-17-I), was filed on August 8, 2003.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2002 and 2003 model vehicles.

A copy of the petition, including a 62-page exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-0803-17-I).

Comments on the proposed changes must be submitted in writing no later than 5:00 p.m. on September 22, 2003 to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property & Casualty Program, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

A public hearing on this matter will not be held unless a separate request for a hearing is submitted to the Office of the Chief Clerk during the comment period defined above.

This notification is made pursuant to Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200305012
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 11, 2003

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Final Action on Rules

Effective Date: September 6, 2003

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF AMENDMENTS TO THE TEXAS AUTOMOBILE RULES AND RATING MANUAL, RULE 141, RENTAL CAR COMPANIES

The Commissioner of Insurance adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual), Rule 141, Rental Car Companies. Staff's petition (Ref. No. A-0603-13-I) was published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4933).

Manual Rule 141 is amended to remove the requirement that an employee of a rental car company or its franchisee verbally inform a prospective renter that he or she may already have an insurance policy that duplicates the coverage that would be provided by the policy (automobile rental liability insurance) offered by the rental car company. The rule is also amended to eliminate the requirement that such an employee verbally inform the prospective renter that the purchase of automobile rental liability insurance is not required as a condition of renting an automobile. The rule's requirements for written disclosures are not changed.

Former Insurance Code Article 21.07, Section 21(i) required a rental car company or franchisee licensed pursuant to that section to conduct a training program to be submitted to the Commissioner of Insurance for approval, and the program was required to meet certain minimum standards. One standard was that the trainee would be "instructed to acknowledge to a prospective renter" that the renter may have insurance policies that already provide the coverage being offered by the rental car company. The statute also provided that the trainee would be instructed "to acknowledge" that the purchase of automobile rental liability insurance is not required for renting a vehicle.

Former Insurance Code Article 21.07, Section 21(g)(2) set forth requirements for written disclosures at every rental car location. Those requirements included similar wording to that previously mentioned in Section 21(i), as well as numerous other provisions. Manual Rule 141, adopted effective May 30, 1998 by Commissioner's Order No. 98-0513, currently requires verbal disclosure and written disclosure to a prospective customer that automobile rental liability insurance may duplicate existing coverage, and that it is not required for the rental transaction.

Former Insurance Code Article 21.07, Section 21 was repealed effective September 1, 1999, and it was in essence replaced by Insurance Code Article 21.09, effective on that same date. Article 21.09, Section

1(d), contains some provisions similar to former Article 21.07, Section 21(i), such as the standard that "each trainee must be instructed to inform a prospective customer that … the purchase of insurance specified in this article is not required in order to complete the associated consumer transaction...." However, there is no longer a statutory requirement for disclosure regarding duplicate coverage, other than in Article 21.09(g), which specifically pertains to written disclosures only.

Insurance Code Article 21.09, Section 1(d) may be interpreted as not mandating verbal disclosure that the purchase of automobile rental liability insurance is optional in the rental transaction, provided that disclosure is made in writing, as required by Article 21.09, Section 1(g). That interpretation is possible because the requirement "to inform" in Article 21.09, Section 1(d)(2) may be construed to be satisfied by disclosure in writing. Certain rental car companies on January 13, 2003 filed a petition with the Department (Ref. No. A-0103-02), asserting that the verbal disclosure requirements of Manual 141 "do not have any consumer benefit," that they "unnecessarily delay the rental transaction," and that they create problems with consistency. The petition also asserts that no other state requires both verbal and written disclosures of this nature, and that the other states require only written disclosures. Considering the foregoing factors, the verbal disclosure requirements are deleted from Manual Rule 141.

The amendments as adopted by the Commissioner of Insurance are shown in an exhibit on file with the Chief Clerk under Ref. A-0603-13-I, which is incorporated by reference into Commissioner's Order No. 03-0730.

The Commissioner of Insurance has jurisdiction over this matter pursuant to Insurance Code Articles 5.10, 5.96, 5.98, and 21.09.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 15th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200305051
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 12, 2003

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

Public Utility Commission of Texas

Title 16, Part 2

TRD-200305076
Filed: August 12, 2003

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Proposed Rule Review

Texas Workers' Compensation Commission

Title 28, Part 2

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 103 concerning Agency Administration. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The agency's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules:

§103.1 General Provisions

§103.2 Employee Training and Education Program

§103.3 No Effect on At-Will Status

§103.100 Historically Underutilized Businesses

§103.101 Vendor Protest Procedures

§103.300 Purpose

§103.301 Applicability

§103.302 Definitions

§103.303 Prerequisites to Suit

§103.304 Sovereign Immunity

§103.305 Notice of Claim of Breach of Contract

§103.306 Agency Counterclaim

§103.307 Duty to Negotiate

§103.308 Timetable

§103.309 Conduct of Negotiation

§103.310 Settlement Approval Procedures

§103.311 Settlement Agreement

§103.312 Costs of Negotiation

§103.313 Request for Contested Case Hearing

§103.314 Mediation Timetable

§103.315 Mediation of Contract Disputes

§103.316 Qualifications and Immunity of the Mediator

§103.317 Confidentiality of Mediation and Final Settlement Agreement

§103.318 Costs of Mediation

§103.319 Settlement Approval Procedures

§103.320 Initial Settlement Agreement

§103.321 Final Settlement Agreement

§103.322 Referral to the State Office of Administrative Hearings

§103.400 Fleet Vehicle Management Program

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on September 22, 2003, and submitted to Linda Velasquez, Legal Services, MS 4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 S. I.H. 35, Austin, TX 78704

TRD-200305093
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: August 12, 2003

♦ ♦ ♦

Adopted Rule Reviews

Boards for Lease of State-Owned Land

Title 31, Part 5

The Boards for Lease of State-Owned Land adopts the review of the rules found in 31 TAC, Part 5, Chapter 201 relating to Operations of the Texas Parks and Wildlife Department and Texas Department of Criminal Justice Board for Lease pursuant to Texas Government Code §2001.039.

The Boards for Lease of State-Owned Land finds that the reasons for the original adoption of each rule in Chapter 201 continues to exist and therefore the rules are valid and applicable. These rules are necessary to the proper administration of their authorizing statutes. As a result of the rule review, the GLO may propose an amendment to §201.4 relating

to Deposits. Any proposed amendments will be published in the *Texas Register* and open to public comments for 30-days.

No comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1234).

TRD-200304789
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
Boards for Lease of State-Owned Land
Filed: August 6, 2003

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General Land Office

Title 31, Part 1

The General Land Office (GLO) adopts the review of the rules found in 31 TAC, Part 1, Chapter 1 relating to Executive Administration pursuant to Texas Government Code §2001.039.

The GLO finds that the reasons for the original adoption of each rule in Chapter 1 continues to exist and therefore the rules are valid and applicable. These rules are necessary to the proper administration of their authorizing statutes.

The GLO received no comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1233).

The General Land Office (GLO) adopts the review of the rules found in 31 TAC, Part 1, Chapter 9 relating to Exploration pursuant to Texas Government Code §2001.039.

The GLO finds that the reasons for the original adoption of each rule in Chapter 9 continues to exist and therefore the rules are valid and applicable. These rules are necessary to the proper administration of their authorizing statutes. As a result of the rule review, the GLO may propose amendments to §9.51 related to Royalty and Reporting Obligations to the State and §9.93 relating to Assignment. Any proposed amendments will be published in the *Texas Register* and open to public comments for 30-days.

The GLO received no comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1233).

The General Land Office (GLO) adopts the review of the rules found in 31 TAC, Part 1, Chapter 10 relating to Exploration and Development of State Minerals Other Than Oil and Gas pursuant to Texas Government Code §2001.039.

The GLO finds that the reasons for the original adoption of each rule in Chapter 10 continues to exist and therefore the rules are valid and applicable. These rules are necessary to the proper administration of their authorizing statutes. As a result of the rule review, the GLO may propose amendments to §10.1 relating to Definitions; Exploration and Development Guide, §10.2 relating to Prospect Permits on State Land, §10.3 relating to Mining Leases on Properties Subject to Prospect, §10.5 relating to Mining Leases on Relinquishment Act Lands, §10.6 relating to Sulphur Unit Agreements, §10.8 relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements, and §10.9 relating to Mineral Awards and Patents. Any proposed amendments will be published in the *Texas Register* and open to public comments for 30-days.

The GLO received no comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1233).

The General Land Office (GLO) adopts the review of the rules found in 31 TAC, Part 1, Chapter 14 relating to the Relationship Between Agency and Private Organizations pursuant to Texas Government Code §2001.039.

The GLO finds that the reasons for the original adoption of each rule in Chapter 14 does not continue to exist and therefore the rules are not valid. As a result of the rule review, the GLO is planning to propose the repeal of Chapter 14. Chapter 14 was originally adopted under the authority of Tex. Rev. Civ. State. Art. 6252-11f which required all state agencies authorized to accept money from private donors or for which a private organization exists to further the purposes and duties of an agency to adopt rules governing the relationship between the agency and such donors or organizations. This statute was repealed by the 73rd Legislature in 1993 (Ch. 268, §46(f), eff. Sept. 1, 1993) and there is no other law that would require the GLO to maintain Chapter 14. Any proposed repeal of this chapter will be published in the *Texas Register* and open to public comment for 30-days.

The GLO received no comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1233).

The General Land Office (GLO) adopts the review of the rules found in 31 TAC, Part 1, Chapter 19 relating to Oil Spill Prevention and Response pursuant to Texas Government Code §2001.039.

The GLO finds that the reasons for the original adoption of each rule in Chapter 19 continues to exist and therefore the rules are valid and applicable. These rules are necessary to the proper administration of their authorizing statutes. The GLO recently proposed amendments to §19.2 related to Definitions, §19.12 relating to Facility Certification Requirements, §19.33 relating to Response, and §19.63 relating to Entry into Port as a result of recent amendments to the Oil Spill Prevention and Response Action of 1991, Chapter 40, Texas Natural Resources Code, which will become effective September 1, 2003, and were published in the July 25, 2003, edition of the *Texas Register* (28 TexReg 5801) and open to public comments for 30 days. The proposed amendments to Chapter 19 were necessary to make them conform to the statutory amendments.

The GLO received no comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1233).

TRD-200304790
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
General Land Office
Filed: August 6, 2003

♦ ♦ ♦

Texas Department of Human Services

Title 40, Part 1

The Texas Department of Human Services (DHS) has completed its review of the rules in Chapter 42 (Medicaid Waiver Program for People Who Are Deaf-Blind with Multiple Disabilities). The notice of intention to review Chapter 42 was published in the May 9, 2003, issue of the *Texas Register* (28 TexReg 3850). DHS received no comments concerning the review.

During its review, DHS determined that the reasons for adopting Chapter 42 continue to exist. The rules are therefore re-adopted in accordance with the requirements of the Government Code, §2001.039.

This concludes DHS's review of 40 TAC, Chapter 42, as required by the Government Code, §2001.039.

TRD-200304915
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: August 8, 2003

♦ ♦ ♦

Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas ("Commission") files this notice of completion of the review of §§3.6, 3.12, 3.13, 3.16, 3.23, 3.27, 3.30, 3.31, 3.34, 3.41, 3.54, 3.55, 3.62, 3.65, 3.66, 3.67, 3.69, 3.72, 3.75, 3.77, 3.80, 3.93, 3.99, 3.100, and 3.102, relating to Application for Multiple Completion; Directional Survey Company Report; Casing, Cementing, Drilling, and Completion Requirements; Log and Completion or Plugging Report; Vacuum Pumps; Gas To Be Measured and Surface Commingling of Gas; Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Natural Resource Conservation Commission (TNRCC); Gas Reservoirs and Gas Well Allowable; Gas To Be Produced and Purchased Ratably; Application for New Oil or Gas Field Designation and/or Allowable; Gas Reports Required; Reports on Gas Wells Commingling Liquid Hydrocarbons before Metering; Cycling Plant Control and Reports; Pipeline Permits Required; Pipeline Tariffs; Obtaining Pipeline Connections; Definitions; Manifest To Accompany Each Transport of Liquid Hydrocarbons by Vehicle; Discharges to Waters of the State; Brine Mining Injection Wells; Commission Forms, Applications and Filing Requirements; Water Quality Certification Definitions; Cathodic Protection Wells; Seismic Holes and Core Holes; and Tax Reduction for Incremental Production. Notice of the proposed review was published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4936).

As part of the review process but in a separate document, the Commission has adopted some amendments, repeals, and new sections for some of the rules being reviewed. That adoption was filed simultaneously with this completed review.

The Commission received no comments on the proposed review of these rules, nor any comments on the proposed amendments, repeals, and new sections that were proposed simultaneously with the review. Therefore, the Commission readopts these rules with any applicable amendments, repeals, and new sections, also adopted in a separate but concurrent rulemaking.

Issued in Austin, Texas, on August 5, 2003.

TRD-200304796
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: August 7, 2003

♦ ♦ ♦

The Railroad Commission of Texas (Commission) files this notice of completion of the review and readoption of §§9.2, 9.9, and 9.51 - 9.54, relating to Definitions; Requirements for Certificate Renewal; General Requirements for Training and Continuing Education; Training and Continuing Education Courses; Continuing Education Credit for Previous Courses; and Commission- Approved Outside Instructors. As part of this review process but in a separate document, the Commission has adopted some amendments to these sections, the main purpose of which is to update the training and continuing education courses offered by the Commission. The Commission's reasons for adopting these rules, as amended, continues to exist. Notice of the proposed review was published in the June 27, 2003, issue of the *Texas Register* (28 TexReg 4936).

The Commission received no comments on the proposed review and received one comment on the proposed amendments; that comment is discussed in the preamble for the adoption of those amendments.

Issued in Austin, Texas, on August 5, 2003.

TRD-200304797
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: August 7, 2003

♦ ♦ ♦

School Land Board

Title 31, Part 4

The School Land Board (SLB) adopts the review of the rules found in 31 TAC, Part 4, Chapter 151 relating to Operations of the School Land Board pursuant to the Texas Government Code §2001.039.

The SLB finds that the reasons for the original adoption of each rule in Chapter 151 continues to exist and therefore the rules are valid and applicable. These rules are necessary to the proper administration of their authorizing statutes.

The SLB received no comments in response to the Notice of Rule Review published in the February 7, 2003, edition of the *Texas Register* (28 TexReg 1235).

TRD-200304791
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
School Land Board
Filed: August 6, 2003

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 25 TAC §295.101(c)

List of Toxic Gases with Corresponding Chemical Abstract Service (CAS) Numbers and Recommended Allowable Concentrations (RACs)

Chemical Name	CAS Number	RAC in ppm	RAC in mg/M^3
Ammonia (Anhydrous)	7664-41-7	50	35
Arsine	7784-42-1	0.05	
Boron trifluoride	7637-07-2	1	3
Butadiene	106-99-0	1	
Carbon monoxide	630-08-0	50	55
Chlorine	7782-50-5	1	3
Chlorine trifluoride	7790-91-2	0.1	0.4
Diazomethane	334-88-3	0.2	0.4
Diborane	19287-45-7	0.1	0.1
Dimethylamine	124-40-3	10	18
Ethylamine	75-04-7	10	18
Ethylene oxide	75-21-8	1	
Fluorine	7782-41-4	0.1	0.2
Formaldehyde	50-00-0	0.75	
Hydrogen bromide	10035-10-6	3	10
Hydrogen chloride	7647-01-0	5	7
Hydrogen cyanide	74-90-8	10	11
Hydrogen fluoride	7664-39-3	3	
Hydrogen selenide	7783-07-5	0.05	0.2
Hydrogen sulfide	7783-06-4	20	50
Ketene	463-51-4	0.5	0.9
Methylamine	74-89-5	10	12
Methyl bromide	74-83-9	20	80
Methyl mercaptan	74-93-1	10	20
Nitric oxide	10102-43-9	25	30
Nitrogen dioxide	10102-44-0	5	9
Nitrogen trifluoride	7783-54-2	10	29
Oxygen difluoride	7783-41-7	0.05	0.1
Ozone	10028-15-6	0.1	0.2
Perchloryl fluoride	7616-94-6	3	13.5
Phosgene (Carbonyl chloride)	75-44-5	0.1	0.4
Phosphine	7803-51-2	0.3	0.4
Selenium hexafluroide	7783-79-1	0.05	0.4
Stibine	7803-52-3	0.1	0.5
Sulfur dioxide	7446-09-5	5	13
Sulfuryl fluoride	2699-79-8	5	20
Tellurium hexafluoride	7783-80-4	0.02	0.2

Figure: 30 TAC §37.9052

CERTIFICATE OF INSURANCE

Name and Address of Insurer and all Reinsurers (herein called the "insurer" and "reinsurers"):

_____

_____

Name and Physical and Mailing Addresses of Insured (herein called the "insured"):

_____

_____

Additional Insured: Texas Commission on Environmental Quality
Physical Address: 12100 Park 35 Circle, MC 214, Austin, TX 78753
Mailing Address: MC 214, P. O. Box 13087, Austin, TX 78711-3087

Facilities covered: *List for each facility: The permit number, name, physical and mailing addresses, and the amount of insurance for closure, post closure, or corrective action. These amounts for all facilities covered must total the face amount shown below.*

_____

_____

Face Amount: _____

Policy Number: _____

Effective Date: _____

The insurer and reinsurers hereby certify that they have issued to the Insured the policy of insurance identified above to provide financial assurance for closure, post closure, or corrective action for the facilities identified above. The insurer and reinsurers further warrant that such policy conforms in all respects with the requirements of 30 Texas Administrative Code (TAC) §37.9050(f) (relating to Insurance), as applicable, and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency. Attached to this certificate is a written statement in language acceptable to the executive director from an officer of each insurer and reinsurer authorized to bind the entity stipulating that this insurance certificate is legally valid and enforceable as the binding agreement superseding any insurance policy provisions which are inconsistent with the requirements of 30 TAC §37.9050(f). The statement also covenants that we, the insurer and reinsurers, shall not raise as a defense any provision of the policy that is inconsistent with the requirements of 30 TAC §37.9050(f).

Whenever requested by the Executive Director of the Texas Commission on Environmental Quality, the insurer and reinsurers agree to furnish a duplicate original of the policy listed above, including all endorsements thereon.

We hereby certify that the wording of this certificate is identical to the wording specified in 30 TAC §37.9052 as such regulations were constituted on the date shown immediately below. The undersigned insurers and reinsurers certify that we are authorized to transact the business of insurance in Texas and each of us has a minimum financial strength rating of "A" and a financial size category of "XV" as assigned by the A.M. Best Company.

(Authorized signature) Insurer: _____

(Name of person signing) _____

(Title of person signing) _____

(Signature of witness or notary) _____

(Date) _____

(Prepare and execute the following information block for each reinsurer):

(Authorized signature) Reinsurer: _____

(Name of person signing) _____

(Title of person signing) _____

(Signature of witness or notary) _____

(Date) _____

Figure: 30 TAC Chapter 336--Preamble

DRAFT TIMELINE

(Please note that these dates and time periods are only preliminary estimates and are subject to further interpretation and conditions)

Procedural Requirement	Date
The commission prepares for acceptance of low-level radioactive waste disposal applications, and writes necessary rules to accept applications.	Start Rule Writing Process: June 1, 2003. Propose: Aug 6, 2003 Commissioners' Agenda Adopt: Dec 6, 2003 Commissioners' Agenda (189 days)
Notice to Receive Applications: The commission prepares staff and communicates with applicants and other stakeholders in rulemaking process. The commission prepares Notice for Secretary of State. Notice published in *Texas Register* that applicants have 180 days from January 1, 2004 to prepare applications.	June 1, 2003 to January 1, 2004. (214 days)
Applicants prepare applications: Applicants complete background work on sites under evaluation as potential sites	January 2, 2004 to June 29, 2004. (180 days)
Applicants submit application to the commission: 30-day period starting 180 days after Notice to Receive Applications is published. (Last timely filed application)	June 30, 2004 to July 29, 2004. (30 days)
The commission issues Administrative Notice of Deficiency 45 days from receipt of last timely filed application.	July 30, 2004 to September 12, 2004. (45 days)
Applicants have three 30-day periods to respond to an Administrative Notice of Deficiency. The commission also has three 30-day periods to review responses and declare applications administratively complete.	September 13, 2004 to March 11, 2005. (180 days)
The commission holds public meetings as soon as possible following completion of administrative review and administrative declaration.	March 12, 2005 to April 25, 2005. (45 days)

The commission selects application with highest comparative merit within 270 days following receipt of last timely filed application.	July 30, 2004 to April 25, 2005. (270/45 days)
The commission completes technical review and prepares draft license 15 months from selecting the one application with highest technical merit.	April 26, 2005 to July 19, 2006. (450 days)
The commission issues Notice of Draft License and Opportunity for Hearing; assume 45 days including 30 days for final preparation of draft license, formatting, and mailout to the applicant and 15 days for publication in the *Texas Register* and a local newspaper. Applicant will also mail out the notice to adjacent landowners within 15 days.	July 20, 2006 to September 2, 2006. (45 days)
SOAH proceedings, if required, are complete and Proposal for Decision issued within one year of Notice of Draft License and Opportunity for Hearing.	September 3, 2006 to September 2, 2007. (365 days)
The commission issues license or denial within 90 days of the issuance of the SOAH Proposal for Decision.	September 3, 2007 to December 1, 2007. (90 days)

Figure: 30 TAC §336.2(147)

Organ Dose Weighting Factors

Organ or Tissue	W_T
Gonads	0.25
Breast	0.15
Red bone marrow	0.12
Lung	0.12
Thyroid	0.03
Bone surfaces	0.03
Remainder	0.30[1]
Whole body	1.00[2]

1. The value 0.30 results from 0.06 for each of five remainder organs, excluding the skin and the lens of the eye, that receive the highest doses.

2. For the purpose of weighting the external whole body dose (for adding it to the internal dose) a single weighting factor, $w_T = 1.0$, has been specified. The use of other weighting factors for external exposure will be approved on a case-by-case basis until such time as specific guidance is issued.

Figure: 40 TAC §97.602(d)(3)(C)

SEVERITY LEVEL I VIOLATIONS $100 - $250 per violation	
Rule Cite	Subject Matter
§97.13	Relating to change of ownership.
§97.212	Relating to prohibiting material alteration of a license.
§§97.215-97.219	Relating to changes that affect the conditions of license.
§97.242	Relating to having a current written document that identifies the agency's organizational structure.
§97.243(a)	Relating to appointing an agency administrator and an alternate or designee.
§97.243(a)(1)-(2)	Relating to the duties of an agency administrator.
§97.243(c)	Relating to adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)-(2)(A)-(D)	Relating to the qualifications and conditions of the agency administrator and alternate or designee.
§97.245(1)-(9)	Relating to adoption of a written policy on an agency's staffing policies.
§97.246	Relating to an agency's personnel records and content of such records.
§97.248	Relating to the use of volunteers in an agency.
§97.249	Relating to adoption of a written policy for the reporting of abuse, neglect, or exploitation of clients.
§97.250(a)(1)-(4)	Relating to adoption of a written policy for the agency's procedures for investigating complaints.
§97.251	Relating to adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts for reporting and peer review.
§97.252(3) or (4)	Relating to department review of an agency's financial/business records.
§97.253	If conducting drug testing, relating to adoption of a written policy on drug testing of employees.
§97.254	Relating to adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Relating to adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256	Relating to adoption of a written policy that describes an agency's plan for publicly known natural disaster preparedness.
§97.281	Relating to adoption of a written policy that describes the agency's client care policies.
§97.282	Relating to adoption of a written policy governing client conduct and responsibility and client rights.
§97.283(a)	Relating to adoption of a written policy for compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.
§97.284	Relating to adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285	Relating to adoption of a written policy that addresses infection control.
§97.286	Relating to adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.

§97.288	Relating to adoption of a written policy that requires all service providers involved in the care of a client, including contracted health care professional or another agency, are engaged in an effective interchange, reporting, and coordination of care regarding the client.
§97.290(a)	Relating to adoption of a written policy for ensuring that back-up services are available when an employee or contractor is not available to deliver the services.
§97.290(b)	Relating to adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291	Relating to adoption of a written policy for an agency's written contingency plan.
§97.292	Relating to a written agreement for services between a client and an agency and the content of the agreement.
§97.294	Relating to adoption of a written policy for establishing time frame(s) for the initiation of care or services.
§97.296(a)	Relating to adoption of a written policy that states whether physician delegation will be honored by the agency.
§97.297	Relating to adoption of a written policy for describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.298	Relating to adoption of a written policy for ensuring compliance with the rules adopted by the Board of Nurse Examiners for the State of Texas in 22 TAC, Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.299	Relating to adoption of a written policy for ensuring compliance with the rules of the Board of Vocational Nurse Examiners adopted at 22 TAC, Chapters 231-240 (relating to Vocational Nursing Education, Licensure and Practice in the State of Texas).
§97.300	Relating to adoption of a written policy for maintaining a current medication list and medication administration record.
§97.301	Relating to requirements for maintaining an agency's client records.
§97.301(a)(2)	Relating to adoption of a written policy that includes written procedures governing the use and removal of records, the release of information, and the incorporation of clinical, progress, or other notes into the client record.
§97.301(b)	Relating to adoption of a written policy for retention of records.
§97.302	Relating to adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.303	Relating to adoption of a written policy that covers the possession of sterile water or saline, certain vaccines or tuberculin, and certain drugs.
§97.321(b)	Relating to branch office compliance with the rules of its parent agency.
§97.321(e)	Relating to requirements for branch offices.
§97.322(b)	Relating to alternate delivery site compliance with hospice service standards.

§97.322(c)	Relating to an alternate delivery site's independent compliance with §97.403(c), (f)(1), (i), and §97.301.
§97.322(e)(1)-(3), and §97.246(b)	Relating to requirements for alternate delivery sites, and providing hospice services.
§97.401(d)	Relating to the use of home health aides.
§97.403(c)	Relating to adoption of a written policy for the provision of hospice services.
§97.403(f)(3)	Relating to professional management responsibility for arranged services.
§97.403(q)-(t)	Relating to services provided by a hospice.
§97.403(w)(5), (6), (8) or (9)	Relating to physical plant requirements in an inpatient hospice.
§97.403(w)(11)	Relating to meal service in an inpatient hospice.
§97.404(e)	Relating to ensuring that when developing the agency's operational policies, the policies are considerate of principles of individual and family choice and control, functional need, and accessible and flexible services.
§97.404 (f)(1)-(3)	Relating to additional requirements for maintaining client records in an agency that provides personal assistance services.
§97.404 (g)	Relating to adoption of a written policy that addresses the supervision of personnel with input from the client or family on the frequency of supervision.
§97.405(g)	Relating to a written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	Relating to an agreement with a licensed end stage renal disease facility to provide back-up outpatient dialysis services.
§97.405(s)	Relating to additional requirements for maintaining client records in an agency with a home dialysis designation.
§97.405(v)	Relating to a written preventive maintenance program for home dialysis equipment.
§97.405(z)	Relating to policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies required of an agency with the home dialysis designation.
§97.406(1)	Relating to adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.501(a)(5)	Relating to providing a surveyor access to records.

Figure 40 TAC §97.602(d)(4)(B)

SEVERITY LEVEL II VIOLATIONS $500 - $1,000 per violation	
Rule Cite	Subject Matter
§97.1(a)(2)	Relating to an agency operating without a license.
§97.220(b)	Relating to having adequate staff to provide services and supervise the provision of services within the agency's established service area.
§97.243(b) and §97.244(b)	Relating to the appointment, qualifications, and duties of a supervising nurse.
§97.247	Relating to verification of employability for unlicensed persons (criminal history checks, nurse aide registry, and employee misconduct registry).
§97.250(a)(1)-(4)	Relating to an agency's investigation of complaints made by a client or a client's family.
§97.251	Relating to compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts relating to reporting and peer review.
§97.252(1) or (2)	Relating to an agency's financial ability to carry out its functions.
§97.282	Relating to compliance with the policies on client conduct and responsibility and client rights.
§97.283(a)(2)	Relating to requirement for the provision of a written statement relating to advance directives.
§97.284	Relating to compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.286(b)	Relating to compliance with 25 TAC §§1.131-1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.
§97.287	Relating to an agency's quality assessment and performance improvement program.
§97.288	Relating to compliance with an agency's policy for coordination of services.
§97.289(a)-(b) or §97.290(a)	Relating to an agency's use of and agreement with independent contractors, arranged services, and back-up services.
§97.295(a)	Relating to an agency's transfer or discharge of a client.
§97.296(b)	Relating to an agency's acceptance of physician delegation orders.
§97.300	Relating to the administration of medication.
§97.303	Relating to the possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.401(b)	Relating to acceptance of a client for home health services and the initiation of services.
§97.401(c)(1)	Relating to employing or contracting with a registered nurse to provide or supervise nursing services.
§97.402(a)	Relating to compliance with the Medicare Conditions of Participation (Social Security Act, Code of Federal Regulations, Title 42, Part 484.)
§97.403(w)(2) or (4)	Relating to a written plan in the event of a disaster.
§97.404(h)	Relating to gastrostomy tube feedings or medication administration for an agency providing personal assistance services.
§97.405(a)	Relating to agencies that provide peritoneal dialysis or hemodialysis services.

§97.405(e)(1)-(3)	Relating to the required services to be provided by an agency with the home dialysis designation.
§97.405(f)(1) or (2)	Relating to orientation and training of personnel providing direct care to clients receiving home dialysis.
§97.405(i)	Relating to an agency's provision of medical and other important information when a dialysis client is transferred to a health care facility for treatment.
§97.405(k)	Relating to routine hepatitis testing of dialysis clients and agency employees providing dialysis care.
§97.405(m)	Relating to the initial admission assessment of a client for home dialysis services.
§97.405(n)	Relating to a long-term program for clients receiving home dialysis.
§97.405(o)	Relating to conducting a history and physical of a home dialysis client.
§97.405(p)(1) or (2)	Relating to physician orders for dialysis treatment.
§97.405(q)	Relating to the care plan for a home dialysis client.
§97.405(r)	Relating to medication administration under the home dialysis designation.
§97.405(t)	Relating to water treatment in the home dialysis setting.
§97.405(w)	Relating to reuse of disposable medical devices in the home dialysis setting.
§97.405(x)(4)	Relating to the administration of blood and blood products for an agency with the home dialysis designation.
§97.405(y)	Relating to supplies for home dialysis.
§97.406	Relating to the provision of psychoactive services.
§97.407	Relating to the provision of intravenous therapy services.
§97.701	Relating to home health aides.
§95.128(a)-(n) and (q)-(r)	Relating to home health medication aides.
§95.128(o)-(p)	Relating to a home health medication aide training program.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Cotton Administrative Penalty Matrix

The Texas Agriculture Code (the "Code"), §12.020 confers administrative authority upon the Texas Department of Agriculture to assess administrative penalties against any person who violates provisions of Chapter 74 of the Code or a rule adopted pursuant to Chapter 74. The department is hereby amending the penalty matrix guidelines published in the August 8, 2003, issue of the *Texas Register* (28 TexReg 6331). These changes, which were requested by all of the Cotton Producer Advisory Committees for Zones 1-8, are applicable to Pest Management Zones 1-8, as set out in 4 Texas Administrative Code, Chapter 20, which requires that all cotton plants be rendered non-hostable by their applicable stalk destruction dates. In zones 1-8, a field will be considered to be in compliance and no penalty will be assessed if fruiting structures are absent. However, in zones 9 and 10, destruction of cotton plants must be accomplished by shredding and plowing for that field to be in compliance. The penalty guideline is being amended to ensure a more appropriate penalty based upon four factors.

The four factors to be considered when assessing administrative penalties are: (1) the fruiting status of the cotton plants; (2) the number of days the field has been out of compliance; (3) the number of acres out of compliance; and (4) any efforts of the cotton producer to comply with the destruction deadline. These factors were developed in accordance with the Code §12.020(d), and with consideration of the purpose and function of the cotton stalk destruction program. Since boll weevil and pink bollworm development occurs inside fruiting structures, the department considers a field that has cotton plants with fruiting structures to pose a greater hazard than does one with no fruiting structures. Additionally, the longer a field is left undestroyed and the more acres that are not in compliance, the greater the probability that boll weevils and pink bollworms will enter diapause. Diapausing insects represent a threat the following season, not only to cotton in the out of compliance field, but also to cotton in neighboring fields.

COTTON PENALTY FORMULA.

In order to assess penalties for failure to destroy cotton stalks or other host plants by the appropriate destruction deadline, the following penalty formula will be used: The penalty will consist of the sum of a base penalty of $250, plus $0.50 per acre per day of noncompliance. Assignment of penalty will not be mitigated by wet field conditions.

The calculation of the number of days a field is out of compliance will be based upon the status of the cotton plants (unharvested, standing stalks; shredded stalks; regrowth or volunteer) and the method of destruction required for the particular cotton stalk destruction zone as set out in 4 Texas Administrative Code, §20.22. In zones 9 and 10, violations involving shredded stalks, standing stalks and unharvested cotton, days will be counted from the day following the destruction deadline. For volunteer cotton in zones 9 and 10, days will be counted from the date of the initial notification by the department that the field has cotton in it. In zones 1 through 8, days will be counted from the day following the destruction deadline for hostable standing stalks and unharvested cotton. For shredded stalks, regrowth and volunteer cotton in zones 1 through 8, days will be counted from the date of notification by the department that the field has hostable cotton in it.

If a field in any zone is brought into compliance within seven days of the date of notification by the department, no penalty will be assessed. To the extent that the cotton producer brings a portion of the total acreage into compliance after initial inspection, or if the cotton producer has applied a properly labeled herbicide to comply with destruction requirements, the department may reduce the penalty up to 50%.

The department may increase the penalty up to 50% for responsible parties with a history of violations of the cotton stalk destruction requirements. The department also may make adjustments in the penalty based upon extenuating circumstances as justice may require.

This penalty guideline is effective immediately upon publication in the *Texas Register*.

TRD-200305105
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: August 13, 2003

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Brazos Valley Council of Governments

Public Notice - Request for Proposals for Housing Opportunities for Persons with AIDS

On August 15, 2003, the Brazos Valley Council of Governments officially will be releasing a Request for Proposals (RFP) for Housing Opportunities for Persons with AIDS (HOPWA) funds to contract for the period February 1, 2004 through January 31, 2005. Proposals are requested from eligible entities to provide rental and/or emergency housing assistance to eligible persons living with HIV/AIDS. Eligible applicants must be public or private nonprofit health care or social services organizations doing business within the Central Texas HIV/AIDS Planning Area, which consists of five HIV Service Delivery Areas (HSDAs), including Austin, Bryan/College Station, San Angelo, Temple/Killeen, and Waco.

The purpose of the HOPWA program is to provide housing assistance for income eligible persons with Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (HIV/AIDS) and their families. The goal of the HOPWA program is to prevent homelessness and to support independent living of persons with HIV/AIDS.

The RFP can be downloaded at http://www.bvcog.org or requested from the HIV Administrative Services Program at (979) 775-4244 or in writing at P.O. Box 4128, Bryan, Texas 77805-4128, Attention: Request for HOPWA RFP.

A letter of intent should be submitted by September 5, 2003. A Pre-Proposal Conference on completion of the proposal will be held on Monday, September 15, 2003, at 9:00 a.m. The meeting will be held at the Brazos Valley Council of Governments (1706 East 29th Street, Bryan, Texas 77802) in the Conference Room. The purpose of the conference is to give all applicants an equal opportunity to ask questions and

get clarification before completing their proposals. Attendance at the conference is not mandatory, but is strongly encouraged. To be considered, proposals must be received no later than 5:00 p.m. on October 15, 2003.

TRD-200305044
Nelda Thompson
Office Manager
Brazos Valley Council of Governments
Filed: August 12, 2003

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following projects(s) during the period of August 1, 2003, through August 6, 2003. The public comment period for these projects will close at 5:00 p.m. on September 12, 2003.

FEDERAL AGENCY ACTIONS:

Applicant: City of League City; Location: The project is located on SH 96 from FM 1266 to SH 146 in Galveston County, Texas. The project site can be located on the U.S.G.S. quadrangle map entitled: League City, Texas. Approximate UTM Coordinates at the origin at FM 1266: Zone 15; Easting: 301582; Northing: 3264995. Approximate UTM Coordinates at the terminus at SH 146: Zone 15; Easting: 305063; Northing: 3267856. Project Description: The applicant proposes to amend the project plans to include a bike trail on State Highway (SH) 96 from FM 1266 to SH 146. The 10-foot-wide bike trail will be constructed by filling approximately 20 feet of the existing roadside drainage ditch within the authorized Right-of-Way side slope to accommodate the impacts to storm water drainage within the ROW. The amendment will not result in an additional discharge of fill material into waters of the U.S. The applicant has provided compensatory mitigation for all jurisdictional impacts to waters of the U.S. within the ROW in the original authorization. CCC Project No.: 03-0270-F1; Type of Application: U.S.A.C.E. permit application #20612(01) is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: U.S. Coast Guard; Location: The project is located at Taylor Bayou at mile 3.8 above the confluence with Clear Lake at Pasadena, Harris County, Texas. Project Description: The applicant proposes to construct a new railroad bridge across Taylor Bayou that will be part of a proposed 12.8-mile rail project for the Burlington Northern and Santa Fe Railway Company and the San Jacinto Rail Limited (SJRL). This rail line will service the petro-chemical industries in the Bayport Industrial District (Bayport Loop). The proposed new SJRL bridge across Taylor Bayou will provide a horizontal clearance of 31.23 feet between piers and a vertical clearance of 6.33 feet above mean high water, elevation 2.71 feet above Mean Sea Level (MSL). The bridge will be constructed approximately 185 feet upstream of the existing Union Pacific Railroad Bayport Loop Bridge. The Union Pacific Railroad bridge provides a horizontal clearance of 20 feet between piers and a vertical clearance of 5.56 feet above mean high water, elevation 2.71 feet above MSL. The existing Port Road Bridge, located approximately 50 feet downstream of the proposed Taylor Bayou Bridge site, provides a horizontal clearance of 32 feet between piers and a vertical clearance of 5.61 feet above mean high water, elevation 2.71 feet above MSL. The 100-year flood elevation is 7.0 feet, mean sea level, while the elevation of the low steel of the bridge is 9.04 feet, mean sea level.

The proposed new bridge will be approximately 860 feet in length and will consist of 26 spans. Each span will be 33-feet long. The proposed typical bent configuration will be a four-pile bent using 16-inch outside diameter shell piles. Every fifth bent will have a double row of piles. The deck will be a typical double cell, pre-stressed concrete box beam. The caps, abutments and the deck will be pre-cast concrete. The ninth span from the west abutment of the proposed SJRL Bridge will line up with the eighth span of the Port Road Bridge to match the existing navigation channel. The eighth span of the existing Port Road Bridge most nearly lines up with the existing Union Pacific Railroad channel span. The proposed bridge will also include retaining walls extending from each abutment towards the adjacent uplands to minimize fill in wetland and open water habitats.

The rail project will cross five waterways that are navigable for the purposes of Coast Guard bridge permitting jurisdiction. The Coast Guard has evaluated the waterways from the standpoint of navigation and has determined that only the proposed crossing of Taylor Bayou will require a Coast Guard Bridge Permit. The other crossings have either met the criteria for the Advance Approval category for construction of bridges or for the Coast Guard Authorization Act of 1982 and will not require specific Coast Guard Bridge Permits.

The Coast Guard's permitting authority will be limited to the bridge across Taylor Bayou and its approaches. The Coast Guard participated in two public meetings for the rail project that were held in Houston, Texas on January 14 and 15, 2003. No comments or objections regarding the bridge-related portion of the project at Taylor Bayou were made at the public meetings and the Coast Guard has received no subsequent written comments or objections to this aspect of the project.

Federal funds will not be used for this project. CCC Project No.: 03-0275-F1; Type of Application: U.S.C.G. permit application #CGD8-10-03 is being evaluated under Section 9 Bridge Permit.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200305113
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: August 13, 2003

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Comptroller of Public Accounts

Notice of Contract Award

Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #156a) was published in the June 6, 2003, issue of the *Texas Register*, (28 TexReg 4443).

The consultant will assist Comptroller in conducting a management and performance review of the Marble Falls Independent School District.

The contract was awarded to SoCo Consulting, Inc., P. O. Box 160671, Austin, Texas 78716-0671. The total amount of this contract is not to exceed $105,000.00.

The term of the contract is August 5, 2003 through May 31, 2004. The final report is due on or before December 15, 2003.

TRD-200304878
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 8, 2003

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Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, and Sections 403.011 and 403.020, Texas Government Code; and House Bill 2964 (H.B. 2964), 78th Texas Legislature, Reg. Sess. (Sept. 1, 2003), the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP #164a) from qualified, independent firms to provide consulting services to Comptroller. The successful respondent will assist Comptroller in conducting a management and performance review of the Stafford Municipal School District (Stafford MSD). Comptroller reserves the right, in its sole discretion, to award one or more contracts for this review. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about September 15, 2003, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, August 22, 2003, between 10 a.m. and 5 p.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 10 a.m. (CZT) on Friday, August 22, 2003.

Mandatory Letters of Intent and Questions: All Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 475-0973, not later than 2:00 p.m. (CZT), on Monday, September 8, 2003. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than September 8, 2003, or as soon thereafter as practical. Mandatory Letters of Intent received after the 2:00 p.m., September 8, 2003 deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Mandatory Letters of Intent to propose.

Closing Date: Proposals must be received in Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2 p.m. (CZT), on Wednesday, September 10, 2003. Proposals received after this time and date will not be considered. Proposals will not be accepted from respondents that do not submit mandatory letters of intent by the September 8, 2003, deadline. Respondents shall be solely responsible for confirming the timely receipt of proposals.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision regarding the award of a contract or contracts. Comptroller reserves the right to award one or more contracts under this RFP.

Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - August 22, 2003, 10 a.m. CZT; All Mandatory Letters of Intent and Questions Due - September 8, 2003, 2 p.m. CZT; Official Responses to Questions Posted - September 8, 2003, or as soon thereafter as practical; Proposals Due - September 10, 2003, 2 p.m. CZT; Contract Execution - September 15, 2003, or as soon thereafter as practical; Commencement of Project Activities - September 15, 2003, or as soon thereafter as practical.

TRD-200305005
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 11, 2003

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 08/18/03 -- 08/24/03 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 08/18/03 -- 08/24/03 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200305045
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 12, 2003

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Texas Commission on Environmental Quality

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 37, 39, 305 and 336

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive comments regarding revisions to 30 TAC Chapters 37, 39, 305, and 336 under the requirements of the Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001.

The proposed rulemaking would implement House Bills 1567 and 1678, 78th Legislature, 2003, and the corresponding amendments to Texas Health and Safety Code, Chapter 401. House Bill 1567 provides for the licensing of a low-level radioactive waste disposal facility and establishes procedures for the commission to accept and evaluate license applications from private entities to dispose of low-level radioactive waste. House Bill 1678 changes the "radiation and perpetual care fund" to be a "perpetual care account" in the general revenue fund. The proposed rulemaking would also incorporate new United States Nuclear Regulatory Commission requirements regarding *Deliberate Misconduct by Unlicensed Persons* (63 FR 1890 and 63 FR 13373) and *Revision of the Skin Dose Limit* (66 FR 16298).

A public hearing on this proposal will be held in Austin, Texas, on September 16, 2003, at 1:30 p.m., at the commission's central office, 12100 Park 35 Circle, Building E, Room 201. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and to answer questions before and after the hearing.

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037-336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Policy and Regulations Division at (512) 239-1510.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239- 4900. Requests should be made as far in advance as possible.

TRD-200304826
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 7, 2003

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Texas Department of Health

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Ford Chiropractic Clinic, P.C., dba Ford Chiropractic Clinic

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Ford Chiropractic Clinic, P.C., doing business as Ford Chiropractic Clinic, (registrant-R27725) of Trophy Club. A total penalty of $2,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, §289.226.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200305073
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 12, 2003

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Texas Health and Human Services Commission

Notice of Award of a Major Consulting Contract

The Health and Human Services Commission (HHSC) announces the award of HHSC Contract #529-03-306 to Winkelman Management Consulting, a company with a principal place of business at 6689 Orchard Lake Road, #307, West Bloomfield, MI 48322.

The consultant will provide technical assistance with development of HHSC's planned Preferred Drug List and Prior Authorization Services Request for Proposals. Specifically, the consultant will: (1) review, comment and assist in the development of the RFP, with particular emphasis on the pricing terms, (2) help HHSC respond to vendor questions concerning the RFP, and (3) assist in the development of evaluation criteria and tools, with particular emphasis on the pricing terms.

The total value of the contract is an amount not-to-exceed $38,000.00. The contract has an effective date of July 14, 2003, and will expire on October 14, 2003, unless extended or terminated sooner by the parties. The contactor will produce three status reports during the term of the contract, with the final report due on October 14, 2003.

On June 30, 2003, the Governor's Planning and Budget Office issued a finding of fact that the consulting services are necessary, and an emergency waiver of the *Texas Register's* publication requirements.

TRD-200305052
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Filed: August 12, 2003

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation to Sisters of Charity of the Incarnate Word, dba St. Joseph Hospital

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Sisters of Charity of the Incarnate Word, doing business as St. Joseph Hospital, (licensee-L02279) of Houston. A total penalty of $5,000 is proposed to be assessed the licensee for alleged violations of 25 Texas Administrative Code, §289.256.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200305072
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 12, 2003

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Notice of Revocation of Certificates of Registration

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following certificates of registration: Allied Dental Center, Killeen, R19920, July 30, 2003; Exxonmobile Chemical Company, Houston, R20510, July 30, 2003; Spinal Dynamics, Inc., Seguin, R22759, July 30, 2003; Rajeev Gupta, M.D., Giddings, R24227, July 30, 2003; Procare, Dallas, R24232, July 30, 2003; Women's Headache & Wellness Centre, San Antonio, R25628, July 30, 2003; Medical Psychiatric Association, Richardson, R25759, July 30, 2003; Jerry F. Castilleja, M.D., Seguin, R26349, July 30, 2003; Mark C. Eidson, M.D., Weatherford, R26364, July 30, 2003.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200305074
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 12, 2003

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Texas Higher Education Coordinating Board

Request for Proposals (RFP) for the Texas Fund for Geography Education

The Texas Higher Education Coordinating Board is releasing this Request for Proposal to the Texas Fund for Geography Grant Program. To be eligible for an award, institutions must submit applications to the Texas Fund for Geography Education Advisory Committee as specified in these instructions. Proposals must be submitted in writing and electronically.

Program Overview:

Name: Texas Fund for Geography Education

Purpose: To provide funding to eligible institutions of higher education to support geography education within the state and to improve geography literacy in the K-12 environment.

Authority: Texas Education Code, 61.944- 61.945; Texas Administrative Code, Title 19, Part 1, Chapter 13, Subchapter J, Rules 13.180-13.187. See appendices.

Eligible Projects: New or existing initiatives designed to improve the quality of geography education in the Texas K-12 environment. Collaborative efforts between public / independent institutions of higher education in Texas and a K-12 partner. The latter may include, but not be limited to, school district(s), individual schools/teachers, regional education service center (s), public and private entities.

General Selection Criteria: Competitive. Designed to award grants that provide the best overall value to the state. Selection criteria shall be based primarily on project quality, cost, and impact the project will have on enhancing geography education in the K-12 environment.

Available Funds: $100,000 for CY 2004.

Grant Award: Minimum: none. Maximum: Not to exceed $50,000.

Grant Period: One-year grants from January 1, 2004 to December 31, 2004.

Grant Disbursement: In a single payment, as soon as possible after the awards are made.

Carryover Funds: Unencumbered funds may not carry over beyond the grant period unless specifically authorized by the Coordinating Board's Assistant Commissioner for Finance, Campus Planning, and Research.

Application Deadline: Applications must be postmarked (or otherwise dated for overnight delivery) by October 15, 2003, or hand-delivered to the Committee's office by 5:00 p.m., October 15, 2003. Applications must also be received electronically by 5:00 p.m., October 15, 2003. E-mail applications to: jeffrey.phelps@thecb.state.tx.us

More Information: Contact Mr. Jeffrey Phelps, Director of Finance, Finance, Campus Planning and Research Division, at 512/427-6139, or by e-mail.

Program Schedule:

October 15, 2003: Proposals are due.

November 3, 2003: Recommendations are made to the National Geographic Society.

November 11, 2003: Proposals are awarded by the National Geographic Society.

November 18, 2003: Award letters are sent.

December 1, 2003: Grantee(s) sign award contracts.

Electronic copies of these instructions and forms can be found at the following website: http://www.thecb.state.tx.us/reports/html/0626.htm.

TRD-200304795
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: August 6, 2003

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Texas Department of Housing and Community Affairs

Multifamily Housing Revenue Bonds (Evergreen at Wylie Senior Community Apartments) Series 2003

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Harrison Intermediate School, 1001 S. Ballard Avenue, Wylie, Texas 75098, at 6:00 p.m. on September 22, 2003 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $8,200,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to PWA-Wylie Senior Community, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing development (the "Development") described as follows: 150-unit multifamily residential rental development to be located at 701 State Highway 78 South, Wylie, Texas 75098. The Development will initially be owned by the Borrower. It is anticipated that units in the Development will be leased to seniors, age 55 and over.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213 and/or rmeyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing.

Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200305106
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 13, 2003

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Multifamily Housing Revenue Bonds (Green Pines II) Series 2003

NOTICE OF PUBLIC HEARING

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Calvert Elementary School, 1925 Marvell Drive, Houston, Texas 77032, at 6:00 p.m. on September 9, 2003 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $11,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to St. Moritz Partners, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing development (the "Development") described as follows: 192-unit multifamily residential rental development to be located at 6200 Greens Road, Humble, Texas 77396. The Development will initially be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer: at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213; and/or rmeyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200305107
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 13, 2003

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Multifamily Housing Revenue Bonds (Martindale Villas) Series 2003

NOTICE OF PUBLIC HEARING

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Codwell Elementary School, 5225 Tavenor, Houston, Texas 77048, at 6:00 p.m. on September 16, 2003 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Martindale Villas, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing development (the "Development") described as follows: 272-unit multifamily residential rental development to be located at 10050 Cullen Boulevard, Houston, Texas 77051. The Development will initially be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer: at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213; and/or rmeyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200305108
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 13, 2003

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Houston-Galveston Area Council

Public Meeting Notice

Amendments to the 2022 Metropolitan Transportation Plan (MTP) and the 2002-2004 and 2004-2006 Transportation Improvement Program (TIP)

Houston-Galveston Area Council

3555 Timmons Lane

Houston, Texas 77027

Tuesday, August 26, 2003

5:30 p.m. - 6:30 p.m.

2nd Floor, Conference Room A

On Tuesday, August 26th, 2003 at 5:30 p.m. the Houston-Galveston Area Council (H-GAC) will host a public meeting on proposed amendments to the 2022 Metropolitan Transportation Plan (MTP), the 2002-2004 Transportation Improvement Program (TIP) and the 2004-2006 TIP. The public is encouraged to attend this important meeting and provide comments to H-GAC.

* Add FM 1093 grade separation projects.

* Cancel the Magnolia Road grade separation project.

* Increase funding for construction of Goose Creek hike / bike trail.

* Program Federal Transit Administration (FTA) Section 5309 funds into the TIP for City of Galveston Island Transit.

* Program Federal Highway Administration (FHWA) FY 2003 Appropriations Bill funds into the TIP for City of Galveston Port of Galveston.

The public comment period on the amendments begins **Sunday, August 10, 2003.** All comments must be received by H-GAC no later than **5 p.m., Wednesday, September 10, 2003.** To obtain more detailed information, please check H-GAC's Transportation Web site at **www.h-gac.com/transportation** or call Lynn Spencer, Transportation Senior Planner, at (713) 993-2436. Copies of the proposed amendments will also be available at the meeting. Written comments may be submitted to Lynn Spencer, Houston-Galveston Area Council, P.O. Box 22777, Houston, Texas 77227, emailed to lynn.spencer@h-gac.com or faxed to (713) 993-4508.

In compliance with the Americans with Disabilities Act, H-GAC will provide for reasonable accommodations for persons with disabilities attending H-GAC functions. Requests should be received by H-GAC 24 hours prior to the function. Call Lynn Spencer at (713) 993-2436 to make arrangements.

TRD-200305101
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: August 13, 2003

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Texas Department of Insurance

Company Licensing

Application to change the name of SPECIALTY LLOYDS INSURANCE COMPANY to RELIABLE LLOYDS INSURANCE COMPANY a domestic Lloyds/Reciprocal company. The home office is in Fort Worth, Texas.

Application to change the name of ALLIANZ INSURANCE COMPANY to ALLIANZ GLOBAL RISKS US INSURANCE COMPANY a foreign fire and/or casualty company. The home office is in Burbank, California.

Application for a new organization applying for a certificate of authority in the State of Texas by CIHC LIFE INSURANCE COMPANY OF TEXAS, a domestic life, accident and/or health company. The home office is in Austin, Texas.

Application for admission to the State of Texas by SECURITAS LIFE INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Edmond, Oklahoma.

Application for admission to the State of Texas by ARCH REINSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Omaha, Nebraska.

Application for admission to the State of Texas by U.S. AEROSPACE INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Addison, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200305109
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 13, 2003

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Texas Office of State-Federal Relations

Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, and Chapter 751, Texas Government Code, the Office of State-Federal Relations (OSFR) announces the issuance of a Request for Proposals (RFP #333-0405-1000) from qualified, independent firms to provide consulting services to OSFR. The successful respondent will assist OSFR in state-federal liaison activities in Washington, D.C. OSFR reserves the right, in its sole discretion, to award one or more contracts for consulting services under this RFP. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about October 1, 2003.

Contact: Parties interested in submitting a proposal should contact David Pagan, Associate Director, 122 C Street NW, Suite 200, Washington, D.C., 20001, telephone number: (202) 434-0211, to obtain a copy of the RFP. OSFR will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, August 15th, between 3 p.m. and 6 p.m., Eastern Zone Time (EZT), and during normal business hours thereafter. OSFR also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 3 p.m. (EZT) on Friday, August 15, 2003.

Questions: All questions regarding the RFP must be sent via facsimile to Mr. Pagan at: (202) 628-1943, not later than 6:00 p.m. (EZT), on Tuesday, August 26, 2003. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than 2:00 p.m. (EZT) on Wednesday, August 27, 2003, or as soon thereafter as practical.

Closing Date: Proposals must be received at the address specified above no later than 2 p.m. (EZT), on Friday, August 29, 2003. Proposals received after this time and date will not be considered. Respondents shall be solely responsible for confirming the timely receipt of proposals.

Evaluation and Award Procedure: All proposals will be subject to evaluation based on the evaluation criteria and procedures set forth in the RFP. The services sought by OSFR through this RFP relate to services previously provided by consultants. OSFR intends to award the contract or contracts under this RFP to a consultant or consultants that previously provided these services, unless a better offer is received. OSFR will make the final decision regarding the award of a contract or contracts. OSFR reserves the right to award one or more contracts under this RFP.

OSFR reserves the right to accept or reject any or all proposals submitted. OSFR is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. OSFR shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - Friday, August 15, 2003, 3 p.m. EZT; Questions Posted - August 27, 2003, or as soon thereafter as practical; Proposals Due - August 29, 2003, 2 p.m. EZT; Contract Execution - September 22, 2003, or as soon thereafter as practical; Commencement of Project Activities - October 1, 2003.

TRD-200305046
David Pagan
Associate Director
Texas Office of State-Federal Relations
Filed: August 12, 2003

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Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificates of Operating Authority

On August 4, 2003, New Access Communications, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60458, and relinquish SPCOA Certificate Number 60251. The Applicant intends to reflect a change in ownership/control, relinquish a certificate, and change the type of provider.

The Application: Application of New Access Communications, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 28268.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 28268.

TRD-200304794
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 6, 2003

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Notice of Application for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. §214(e) and P.U.C. Substantive Rule §26.418

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on August 8, 2003, for designation as an eligible telecommunications carrier pursuant to 47 U.S.C. §214(e) and P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Panhandle Telecommunication Systems, Incorporated (PTSI) for Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to 47 U.S.C. §214(e) and P.U.C. Substantive Rule §26.418. Docket Number 28316.

The Application: The company is requesting ETC designation in order to be eligible to receive federal universal service funding to assist it in providing universal service in Texas. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ETCs for service areas set forth by the commission. PTSI is requesting ETC designation in the Perryton exchange in which Valor Telecommunications of Texas, LP is the incumbent provider in the state of Texas. PTSI holds Certificate of Operating Authority Number 50016. The proposed effective date is September 22, 2003.

This application has been designated Docket Number 28316 by the commission. Persons who wish to comment on this application should notify the commission by September 11, 2003. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll-free number (888) 782-8477. All correspondence should refer to Docket Number 28316.

TRD-200305104
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2003

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Notice of Application for Designation as an Eligible Telecommunications Provider Pursuant P.U.C. Substantive Rule §26.417

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on August 8, 2003, for designation as an eligible telecommunications provider pursuant to P.U.C. Substantive Rule §26.417.

Docket Title and Number: Application of Panhandle Telecommunication Systems, Incorporated (PTSI) for Designation as an Eligible Telecommunications Provider (ETP) Pursuant to P.U.C. Substantive Rule §26.417. Docket Number 28315.

The Application: The company is requesting ETP designation in order to be eligible to receive state universal service funding to assist it in providing universal service in Texas. Pursuant to P.U.C. Substantive Rule §26.417, the commission, either upon its own motion or upon request, shall designate qualifying telecommunications providers as ETPs for service areas set forth by the commission. PTSI is requesting ETP designation in the Perryton exchange in which Valor Telecommunications of Texas, LP is the incumbent provider in the state of Texas. PTSI holds Certificate of Operating Authority Number 50016. The proposed effective date is September 22, 2003.

This application has been designated Docket Number 28315 by the commission. Persons who wish to comment on this application should notify the commission by September 11, 2003. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll-free number (888) 782-8477. All correspondence should refer to Docket Number 28315.

TRD-200305103
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2003

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 7, 2003, for a service

provider certificate of operating authority (SPCOA), pursuant to the Public Utility Regulatory Act (PURA) §§54.151 - 54.156. A summary of the application follows.

Docket Title and Number: Application of Time Warner Cable Information Services (Texas), L.P., doing business as Time Warner Cable, for a Service Provider Certificate of Operating Authority, Docket Number 28303 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service and long distance services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 27, 2003. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 28303.

TRD-200304973
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 8, 2003, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of applicant's request for NXX codes.

Docket Title and Number: Application of ionex telecommunications, inc. for Waiver of Denial by the NANPA of NXX Code Request in the Bammel Rate Center. Docket Number 28312.

The Application: ionex telecommunications, inc. (ionex) submitted a Central Office Code (NXX) Assignment Request to the Pooling Administrator (PA) for the assignment of an additional NXX code to offer extended/expanded local two way calling service in the Bammel rate center. The PA denied ionex's request based on practices designed to prohibit acquisition of unneeded numbering resources. ionex seeks an exception to the application of NXX assignment guidelines. ionex asked that the commission instruct the PA to release the numbering resources ionex contends are necessary to allow ionex to offer a more competitive range of services to the local businesses within the Bammel service area.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 3, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 28312.

TRD-200305097
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2003

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 8, 2003, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of applicant's request for NXX codes.

Docket Title and Number: Application of ionex telecommunications, inc. for Waiver of Denial by the NANPA of NXX Code Request in the Midland Rate Center. Docket Number 28313.

The Application: ionex telecommunications, inc. (ionex) submitted a Central Office Code (NXX) Assignment Request to the Pooling Administrator (PA) for the assignment of an additional NXX code to offer extended/expanded local two way calling service in the Midland rate center. The PA denied ionex's request based on practices designed to prohibit acquisition of unneeded numbering resources. ionex seeks an exception to the application of NXX assignment guidelines. ionex asked that the commission instruct the PA to release the numbering resources ionex contends are necessary to allow ionex to offer a more competitive range of services to the local businesses within the Midland service area.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 3, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 28313.

TRD-200305098
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2003

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 8, 2003, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of applicant's request for NXX codes.

Docket Title and Number: Application of ionex telecommunications, inc. for Waiver of Denial by the NANPA of NXX Code Request in the Odessa Rate Center. Docket Number 28314.

The Application: ionex telecommunications, inc. (ionex) submitted a Central Office Code (NXX) Assignment Request to the Pooling Administrator (PA) for the assignment of an additional NXX code to offer extended/expanded local two way calling service in the Odessa rate center. The PA denied ionex's request based on practices designed to prohibit acquisition of unneeded numbering resources. ionex seeks an exception to the application of NXX assignment guidelines. ionex asked that the commission instruct the PA to release the numbering resources ionex contends are necessary to allow ionex to offer a more competitive range of services to the local businesses within the Odessa service area.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 3, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 28314.

TRD-200305099
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2003

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on July 3, 2003, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Tehuacana Exchange for Expanded Local Calling Service, Project Number 28087.

The petitioners in the Tehuacana exchange request ELCS to the exchanges of Groesbeck, Hubbard, Teague, and Wortham.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 8, 2003. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2789. All comments should reference Project Number 28087.

TRD-200304972
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and 1-800- Reconex, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28273. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28273. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28273.

TRD-200304867
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and CallNet Communications, Incorporated, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28274. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk.

Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28274. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28274.

TRD-200304868
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Spruce Communications, LP, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28275. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28275. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28275.

TRD-200304869
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Now Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28276. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28276. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28276.

TRD-200304870
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and AT&T Broadband Phone of Texas, LLC, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28277. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28277. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28277.

TRD-200304871
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 6, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and CityNet Telecommunications, Incorporated, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of

15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28294. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28294. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 8, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 28294.

TRD-200304974
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 6, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and SBC Wireless, LLC doing business as Cingular, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28299. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28299. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 8, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 28299.

TRD-200304975
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 6, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and National Discount Telecom, LLC, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28300. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28300. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 8, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 28300.

TRD-200304976
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 7, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and nii Communications, Limited, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28304. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28304. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 28304.

TRD-200304982
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Public Notice of Amendment to Interconnection Agreement

On August 7, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Logix Communications Corporation, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28305. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28305. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 28305.

TRD-200304983

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2003

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a notice of intent to file long run incremental cost (LRIC) studies pursuant to Public Utility Commission Substantive Rule §26.214. The Applicant will file the long run incremental cost study on August 14, 2003.

Docket Title and Number. CenturyTel of Port Aransas, Incorporated Application for Approval of Long Run Incremental Cost Study for New Custom Calling Feature, 3-Way Calling pursuant to Public Utility Commission Substantive Rule §26.214, Docket Number 28264.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 28264. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200304858
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a notice of intent to file long run incremental cost (LRIC) studies pursuant to Public Utility Commission Substantive Rule §26.214. The Applicant will file the long run incremental cost study on August 14, 2003.

Docket Title and Number. CenturyTel of San Marcos, Incorporated Application for Approval of Long Run Incremental Cost Study for New Custom Calling Feature, 3-Way Calling pursuant to Public Utility Commission Substantive Rule §26.214, Docket Number 28265.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 28265. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200304859

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 4, 2003, Eastex Telephone Cooperative, Incorporated and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28270. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28270. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28270.

TRD-200304865
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 4, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Enhanced Communications Group, LLC, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28272. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28272. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones

(TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28272.

TRD-200304866
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 5, 2003, Eastex Telephone Cooperative, Incorporated and Alltel Communications, Incorporated, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28287. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28287. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28287.

TRD-200304872
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 5, 2003, Cumby Telephone Cooperative, Incorporated (CLEC) and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28289. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28289. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-

8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28289.

TRD-200304873
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 5, 2003, Cumby Telephone Cooperative, Incorporated and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28290. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28290. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28290.

TRD-200304874
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 5, 2003, Riviera Telephone Company, Incorporated and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28291. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28291. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of

Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28291.

TRD-200304875
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Interconnection Agreement

On August 5, 2003, Nortex Communications and T-Mobile USA, Incorporated formerly known as Voicestream Wireless Corporation, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 28292. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 28292. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 28292.

TRD-200304876
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 7, 2003

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Public Notice of Workshop on Development of the Filing Package for Fees and Rates of Independent Organizations

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding the creation of the filing package for fees and rates of independent organizations on Wednesday, September 3, 2003, at 9:00 a.m. in the Hearing Room A, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 28218, *Development of the Filing Package for Fees and Rates of Independent Organizations*, has been established for this proceeding. The workshop will provide an opportunity for interested persons to advise the commission staff of their views on how the filing package should be developed and implemented.

Ten days prior to the workshop the commission will make available in Central Records under Project Number 28218 an agenda for the format of the workshop and a copy of a draft filing package. The commission requests that persons planning on attending the workshop register by phone with Rich Lain, Financial Review Division, (512) 936-7454.

Questions concerning the workshop or this notice should be referred to Rich Lain, Financial Review Division, (512) 936-7454. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200305092
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2003

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Request for Comment Regarding Third Party Administrator

The Public Utility Commission of Texas (commission) has initiated Project Number 26839, *Proceeding Regarding Third Party Administrator*, to examine third party administrator (TPA) issues. The commission asks that interested parties file comments answering the following questions:

1. Please identify what specific problem(s) you believe a TPA, in any form, could or should resolve.

2. Using the TPA Continuum below, please identify which of the five scenarios, if any, is most desirable, and explain why. (Include any relevant discussion of cost/benefit analysis, i.e., whether a TPA would be more costly than beneficial to your company.)

3. If none of the five scenarios on the TPA Continuum match your concept of a TPA, please identify which functions you would like a TPA to perform. (Include any relevant discussion of cost/benefit analysis, i.e., whether a TPA would be more costly than beneficial to your company.)

(a) For each function that you identify that a TPA should perform, how are costs recovered now through end user charges and/or carrier-to-carrier charges? Please provide a detailed description, including the amount, of these charges.

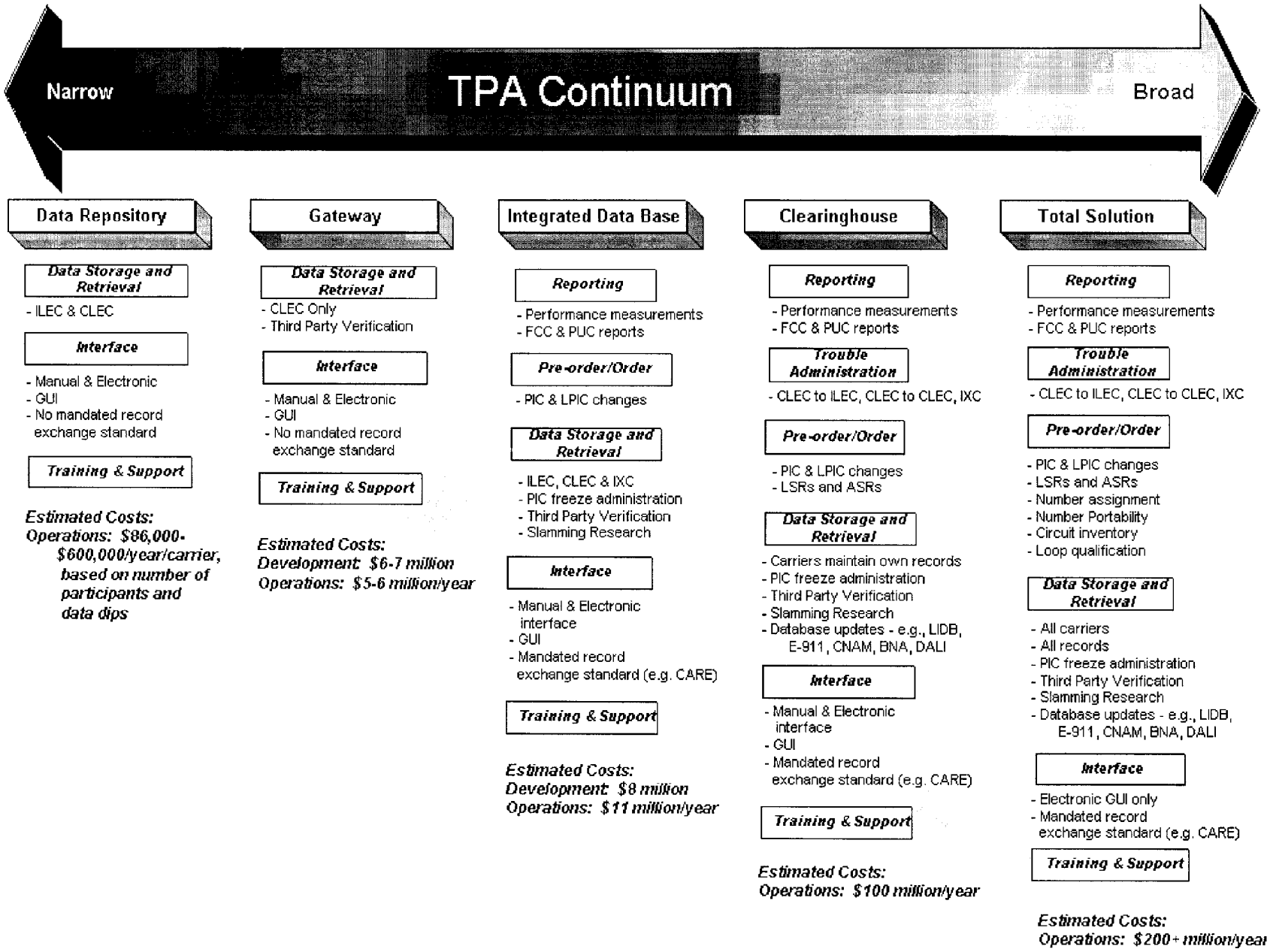
(b) If possible, for your TPA scenario, please provide a cost estimate for: (1) development; (2) annual operational costs; and (3) any potential cost recovery through end user charges and/or carrier-to-carrier charges, including a detailed description and the amount of the proposed charges.

4. On a scale of 1 to 10, with 1 being not at all desirable and 10 being extremely desirable, how would you rate your level of interest in a TPA in Texas? Please explain. (Assume the TPA would perform the functions you believe desirable and appropriate, and include any relevant discussion of cost/benefit analysis, i.e., whether a TPA would be more costly than beneficial to your company.)

5. Would implementing a TPA alleviate barriers to market entry in Texas, or would it be a barrier to continuing to do business? Please explain.

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 30 days of the date of publication of this notice. All responses should reference Project Number 26839. The commission requests that comments be limited to 20 pages. This notice is not a formal notice of proposed rulemaking, however, the parties' responses to the questions will assist the commission in developing a commission policy or determining the necessity for a related rulemaking or workshop.

Questions concerning this notice should be referred to Andrew Kang, Legal & Enforcement Division at (512) 936-7293 or Rosemary McMahill, Policy Development Division at (512) 936- 7244. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.


Narrow
TPA Continuum
Broad
Data Repository
Data Storage and Retrieval
- ILEC & CLEC
Interface
- Manual & Electronic
- GUI
- No mandated record exchange standard
Training & Support
Estimated Costs:
Operations: $86,000-$600,000/year/carrier, based on number of participants and data dips
Gateway
Data Storage and Retrieval
- CLEC Only
- Third Party Verification
Interface
- Manual & Electronic
- GUI
- No mandated record exchange standard
Training & Support
Estimated Costs:
Development: $6-7 million
Operations: $5-6 million/year
Integrated Data Base
Reporting
- Performance measurements
- FCC & PUC reports
Pre-order/Order
- PIC & LPIC changes
Data Storage and Retrieval
- ILEC, CLEC & IXC
- PIC freeze administration
- Third Party Verification
- Slamming Research
Interface
- Manual & Electronic interface
- GUI
- Mandated record exchange standard (e.g. CARE)
Training & Support
Estimated Costs:
Development: $8 million
Operations: $11 million/year
Clearinghouse
Reporting
- Performance measurements
- FCC & PUC reports
Trouble Administration
- CLEC to ILEC, CLEC to CLEC, IXC
Pre-order/Order
- PIC & LPIC changes
- LSRs and ASRs
Data Storage and Retrieval
- Carriers maintain own records
- PIC freeze administration
- Third Party Verification
- Slamming Research
- Database updates - e.g., LIDB, E-911, CNAM, BNA, DALI
Interface
- Manual & Electronic interface
- GUI
- Mandated record exchange standard (e.g. CARE)
Training & Support
Estimated Costs:
Operations: $100 million/year
Total Solution
Reporting
- Performance measurements
- FCC & PUC reports
Trouble Administration
- CLEC to ILEC, CLEC to CLEC, IXC
Pre-order/Order
- PIC & LPIC changes
- LSRs and ASRs
- Number assignment
- Number Portability
- Circuit inventory
- Loop qualification
Data Storage and Retrieval
- All carriers
- All records
- PIC freeze administration
- Third Party Verification
- Slamming Research
- Database updates - e.g., LIDB, E-911, CNAM, BNA, DALI
Interface
- Electronic GUI only
- Mandated record exchange standard (e.g. CARE)
Training & Support
Estimated Costs:
Operations: $200+ million/year

TRD-200305075
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2003

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Teacher Retirement System of Texas

Notice

The Teacher Retirement System of Texas (TRS) is soliciting applications to fill a position on the TRS Medical Board. Medical Board members must be physicians licensed to practice medicine in the State of Texas and be of good standing in the medical profession. Members are appointed to the three-member board for a six-year term and paid $33,000 per year for services performed under contract. The position requires members to review applications for disability retirement and supportive documentation and to render a decision on whether a TRS member is mentally or physically disabled from the further performance of duty and whether the disability is probably permanent. Approximately one thousand applications are filed each year. The TRS Medical Board meets every other month to discuss matters related to disability retirement.

Questions should be directed to Jim Grametbauer at TRS, (512) 542-6207. Resumes will be accepted through September 30, 2003 and should be sent to the Teacher Retirement System, 1000 Red River Street, Austin, Texas 78701-2698.

All resumes will be initially reviewed and evaluated by a committee on the basis of demonstrated competence and qualification to perform services. The committee will present recommendations to the TRS Board of Trustees Benefits Committee for consideration and recommendation to the full Board of Trustees. The Board of Trustees will make the final appointment.

TRS reserves the right to accept or reject any or all applications submitted. TRS is under no legal obligation or any other type of obligation to execute any contracts on the basis of this notice. TRS shall not pay for any costs incurred by any individual or entity in responding to this notice.

TRD-200305111
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Filed: August 13, 2003

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Texas A&M Unversity, Board of Regents

Request for Information

The Texas A&M University System (TAMUS) requests information from law firms interested in representing TAMUS and its component institutions in immigration matters. This Request for Information (RFI) is issued to establish (for the time frame beginning September 1, 2003 to August 31, 2004) a referral list from which TAMUS, by and through its Office of General Counsel, will select appropriate counsel for representation on specific immigration matters as the need arises. This notice is being posted in accordance with Chapter 2155 of the Texas Government Code.

Description

TAMUS consists of nine universities, a health science center and eight state agencies as follows:

Prairie View A&M University

Tarleton State University

Texas A&M International University

Texas A&M University

Texas A&M University--Commerce

Texas A&M University--Corpus Christi

Texas A&M University--Kingsville

Texas A&M University--Texarkana

West Texas A&M University

The Texas A&M University System Health Science Center

Texas Agricultural Experiment Station

Texas Cooperative Extension

Texas Wildlife Damage Control Service

Texas Engineering Experiment Station

Texas Engineering Extension Service

Texas Forest Service

Texas Transportation Institute

Texas Veterinary Medical Diagnostic Service

Research activities and other educational pursuits at each institution often include the participation of international students, faculty and staff. Subject to the approval of the Texas Attorney General, TAMUS will engage outside counsel to provide a variety of immigration and nationality law services relating to, without limitation, nonimmigrant employment status, labor certification, permanent resident immigrant status and obtaining U.S. citizenship status for TAMUS's teaching and research faculty. TAMUS also will engage outside counsel, from time to time, for litigation, relating to immigration matters, and to handle other related matters. TAMUS invites responses to this RFI from qualified firms for the provision of such legal services under the direction and supervision of TAMUS's Office of General Counsel.

Responses

Responses to this RFI should include at least the following: (1) a description of the firm's or attorney's qualifications for performing the legal services, including the firm's prior experience in immigration matters, the names, experience and expertise of the attorneys who may be assigned to work on such matters, and appropriate information regarding efforts made by the firm to encourage and develop the participation of minorities and women in the provision both of the firm's legal services generally and immigration matters in particular; (2) the submission of the fee information (either in the form of hourly rates for each attorney who may be assigned to perform services in relation to TAMUS's immigration matters, flat fees, or other fee arrangements directly related to the achievement of specific goals and cost controls) and billable expenses; (3) disclosures of conflicts of interest (identifying each and every matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to TAMUS or to the State of Texas, or any of its boards, agencies, commissions, universities or elected or appointed officials); and (4) confirmation of willingness to comply with policies, directives and guidelines of TAMUS and the Attorney General of the State of Texas.

Format and Person to Contact

Responses should be sent by mail or delivered in person, marked "Response to Request for Information--Immigration". Address all

responses to Delmar L. Cain, General Counsel, Office of General Counsel, The Texas A&M University System, 200 Technology Way, Suite 2079, College Station, Texas 77845-3424 (telephone (979) 458-6120 for questions). Three copies of the response are requested.

Deadline for Submission of Response

All responses must be received by the Office of General Counsel of The Texas A&M University at the address set forth above no later than 5:00 P.M, September 22, 2003.

TRD-200304962
Vickie Burt Spillers
Executive Secretary of the Board
Texas A&M University, Board of Regents
Filed: August 11, 2003

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Veterans Land Board

Invitation for Bid Notice--Central Texas State Veterans Cemetery

Requisition 305-4-0087-DF

Veterans Land Board Project No. FAI-TX-02-02

Project Name: Central Texas State Veterans Cemetery, Killeen, Texas, for the Texas Veterans Land Board (VLB)

Sealed Bids for this project will be received until **3:00 P.M., September 15, 2003, at the Texas General Land Office, 1700 North Congress Avenue, Stephen F. Austin Building, B-30 Austin, Texas 78701.** See the Invitation for Bid (IFB) for other delivery choices.

Plans and specifications may be obtained from PBS&J, 206 Wild Basin Road, Suite 300, Austin, Texas 78746. Contact: Emily Truman Voice: (512) 327-6840, Fax: (512) 327-2353, for a deposit of $300.00, refundable upon return of a complete, unmarked set(s).

A mandatory (must attend and sign in) Pre-Bid Conference will be held at the Texas General Land Office, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas 78701, Room 118 at 2:00 P.M. August 29, 2003. The VLB will reject bids submitted by firms that do not attend the mandatory Pre-Bid Conference.

Only bids submitted on the official CONTRACTOR'S BID FORM found in the Project Manual will be accepted.

The IFB may be obtained after August 14, 2003, by faxing a request to Debby French at (512) 463-1795 or e-mailing debby.french@glo.state.tx.us or through the Electronic State Business Daily at: **http://esbd.tbpc.state.tx.us/1380/sagency.cfm**

No oral explanation in regard to the meaning of the Drawings and Specifications will be made and no oral instructions will be given before the award of the Contract. Discrepancies, omissions or doubts as to the meaning of Drawings and Specifications and all communications concerning the project shall be communicated in writing to Debby French (Fax) (512) 463-1795 or e-mail debby.french@glo.state.tx.us for interpretation. Bidders should act promptly and allow sufficient time for a reply to reach them before the submission of their Bids. Any interpretation made will be in the form of an addendum to the Specifications, which will be forwarded to all known Bidders and its receipt by the Bidder shall be acknowledged on the Contractor's Proposal Form or on the face of the Addendum and returned with the bid.

TRD-200305112
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
Veterans Land Board
Filed: August 13, 2003

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Texas Workers' Compensation Commission

Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites all qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the Procedures and Standards for the Medical Advisory Committee.

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members, which are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the public.

The purpose and tasks of the Medical Advisory Committee are outlined in the Texas Workers' Compensation Act, §413.005, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings.

During a primary member's absence, an alternate member must attend meetings of the Medical Advisory Committee, subcommittees, and work groups to which the primary member is appointed. The alternate may attend all meetings and shall fulfill the same responsibilities as primary members, as established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

Medical Advisory Committee representative positions currently vacant include: 1. Alternate Public Health Care Facility Representative 2. Primary Chiropractor 3. Primary and Alternate Dentist Representatives 4. Alternate Medical Equipment Supplier Representative 5. Alternate Employer Representative. Also, at the end of August 2003,, several terms will expire leaving other vacancies: Primary and Alternate Private Health Care Facility Representatives, Primary and Alternate Osteopath Representatives, Alternate Chiropractor Representative, Primary and Alternate Pharmacist Representatives, Primary and Alternate Occupational Therapist Representatives, Primary and Alternate General Public Representatives, Primary and Alternate Insurance Carrier Representatives, and Primary and Alternate Acupuncturist Representatives.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's website at *http://www/twcc.state.tx.us* and then clicking on Calendar of Commission Meetings, Medical Advisory Committee. Applications may also be obtained by calling Jane McChesney, MAC Coordinator at 512-804-4855 or Judy Bruce, Director, Medical Review at 512-804-4802.

The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

LEGAL AUTHORITY The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

PURPOSE AND ROLE The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

COMPOSITION Membership. The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

Terms of Appointment: Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

RESPONSIBILITY OF MAC MEMBERS Primary Members. Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

Alternate Members. Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

Committee Officers. The chairman of the MAC is designated by the Commissioners. The MAC will elect a vice chairman. A member shall be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

Responsibilities of the Chairman. Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division.

Prior to a MAC meeting confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate: a. Preparation of a suitable agenda. b. Planning MAC activities. c. Establishing meeting dates and calling meetings. d. Establishing subcommittees. e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

COMMITTEE SUPPORT STAFF The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

SUBCOMMITTEES The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

WORK GROUPS When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

WORK PRODUCT No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

MEETINGS Frequency of Meetings. Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

CONDUCT AS A MAC MEMBER Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

Comportment Requirements for MAC Members:

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200305013
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: August 11, 2003

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How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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